THE COURT DISPOSES

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COVICI · FRIEDE · PUBLISHERS
NEW YORK

To

ESTHER

Tu mihi curarum requies, tu nocte vel atra
Lumen, et in solis tu mihi turba locis.

BIBLIOGRAPHY AND ACKNOWLEDGMENT

The author is indebted, as is every writer on the subject, to the works of Charles Warren, Louis Boudin, Edward S. Corwin, Felix Frankfurter, Thomas Reed Powell and Roscoe Pound. He would also acknowledge his debt to Margaret Spahr's "Natural Law, Due Process and Economic Pressure" (24 *American Political Science Review* 2), Ray A. Brown's "Due Process of Law, Police Power and the Supreme Court" (40 *Harvard Law Review* 7), Maurice Finkelstein's "From Munn v. Illinois to Tyson v. Banton" (27 *Columbia Law Review* 7), Keezer and May's summary of anti-trust law enforcement in *Public Control of Business,* the discussion of rate regulation in John Maurice Clark's *Social Control of Business,* and Theodore F. T. Plucknett's "Bonham's Case and Judicial Review" (40 *Harvard Law Review* 1).

The author would like to express his thanks for the aid, sympathy and encouragement of Mr. Leonard Boudin, Mr. Nathan Greene and Mrs. Elinor M. Herrick; and the benefits derived from C. M.'s morning conferences and J. J.'s aid late at night on typing.

NEW YORK, April 12th, 1937.

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I

Judges Rule Us

OUR government differs in one respect from other representative governments. The difference lies in the power wielded by our Supreme Court.

In the United States, as in other democracies, we elect the men who make our laws, and those in charge of administering them. We criticize them as freely as we please. Their terms in office are limited. At regular intervals they must present themselves and their policies for approval or rejection. In the United States alone the decisions arrived at and the actions taken by the representatives of the people, no matter how thoroughly debated or widely approved, are never final. They may be overruled at any time by a majority of the Justices on the Supreme Court of the United States.

A worker harassed by poverty may wonder why the Court should decide that minimum wage legislation would curtail his liberty. The Constitution does not say so. A farmer who watches the prices on the Liverpool and Chicago markets nervously, the value of his crop dependent on their fluctuations, may wonder why the Court should decide that agriculture is a local problem. The Constitution does not say so.

The manufacturer and the mine-owner often ask help of the federal government. A protective tariff enables them to charge more for their products than they could under conditions of free competition. The

Constitution does not mention a protective tariff. Yet the Court has held the protective tariff constitutional. Here it finds manufacturing and mining properly of national concern.

But when the federal government seeks to protect the earnings of labor as well as of capital in manufacturing and mining, the Court says these are local matters, beyond the jurisdiction of Congress. The Constitution does not say so. Wheat as well as steel is produced on a world market. A protective tariff enables the steel-maker to levy on the consumer. A processing tax enables the wheat grower to levy on the consumer. The Supreme Court says the protective tariff is constitutional but the processing tax is unconstitutional. The Constitution mentions neither.

Constitutional law has a formidable sound. When it begins to touch our lives so deeply, we must all, in self-defense, become constitutional lawyers. This is a book by a layman for laymen. It is an attempt to understand government by judges, and the remedies proposed for misgovernment by judges. In our day the power of the Supreme Court has become so great, the views that dominate it so backward, as to jeopardize the security of our society by blocking adjustment to changing conditions.

II

Five Men on a Safety Valve

AN examination of the judicial process may fruitfully begin with the decision holding the New York Minimum Wage Law unconstitutional. The nullification of federal reform legislation by the Court had left state action the only outlet for discontent. The Minimum Wage decision hung a constitutional millstone on the safety valve.

With the exception of the Gold Clause cases, where five of the nine judges realized that financial panic would be precipitated by a ruling against the government, the Supreme Court had consistently denied Congress the power to deal with fundamental economic problems, though they were obviously national in scope. The Court insisted that manufacturing and mining and farming and municipal bankruptcies, and the production of oil, were purely local problems subject only to the jurisdiction of the States. The New York Minimum Wage case was the first major test of the Court's readiness to let the States deal with these "local" problems.

In passing on the NRA, the Court indicated that federal minimum wage legislation would be unconstitutional. It now held that state minimum wage regulation was also unconstitutional. In the NRA decision, the Court said that federal regulation would be an invasion of rights reserved to the states by the Constitution. It now declared that the Constitution

forbade the states to exercise those rights. Some, fearing overcentralization of government, welcomed the NRA decision. They felt that the purposes of the law could be achieved more safely by the states. They now saw the Court creating a No Man's Land in which neither state nor federal government could act.

The Court had several times been a center of controversy. The Minimum Wage decision was based on the "due process" clause, and the Court's facility for pulling legalistic rabbits from words so vague had often drawn protest. The decision was 5-4, and the unwillingness of the Court, when so closely divided, to give legislators the benefit of the doubt, was a familiar source of criticism. What hurt the Court most was that the decision showed, more clearly than ever before, how backward government by judges could be.

The obscurity of its language often serves to shield the Court. Legal phrases could not veil the significance of the Minimum Wage decision. Its impact was on the pay envelope, where the humblest worker could understand it. A Brooklyn laundry manager named Tipaldo made false entries in his books to hide violations of the minimum wage law. He forced some of his employees to "kick back" the difference between the lawful minimum and what he proposed to pay them. Arrested and indicted, he had appealed to the Supreme Court.

Anatole France once said that rich and poor have an equal right to sleep under bridges. "Constitutional limitations . . . ," our courts have held, "involve fundamental principles of human rights reserved to the whole people and not to any favored class of citi-

zenship. They are for the protection alike of the rich and the poor, the strong and the weak, the high and the low." The Supreme Court set Tipaldo free, and declared state minimum wage laws unconstitutional.

The principles upon which minimum wage legislation are based had won acceptance in every industrial country. The earliest minimum wage legislation was enacted in the 1890's; the first American minimum wage law was passed by Massachusetts in 1912. Minimum wage laws were hardly a New Deal innovation. Between 1912 and 1923, minimum wage laws for the protection of women and children were enacted in fourteen States and by Congress for Puerto Rico and the District of Columbia. Between 1913 and 1919, they had won the endorsement of groups as diverse as the American Federation of Labor, the Merchants' and Manufacturers' Association of the District of Columbia, the New York Factory Investigating Commission headed by Robert F. Wagner and Alfred E. Smith, and the National Catholic War Council. The last, in its Social Reconstruction Program of 1919, included Federal minimum wage laws for both men and women along with Federal legislation against child labor in its proposals for economic reform.

Legislative protection of wages received a setback in 1923 when the Supreme Court declared the District of Columbia Minimum Wage law unconstitutional. With the depression, hope of judicial approval revived. Seventeen states were enforcing legislation fixing minimum wages for the labor of women and children when in June, 1936, the Court again ruled against minimum wages.

The law the Supreme Court frowned upon was concerned with no fancied wrong. The evils it aimed to correct had attracted wide attention. The New York law was enacted in 1933. In Connecticut, Massachusetts, rural New York, Pennsylvania and New Jersey, there was a mushroom growth of sweatshops employing women and young girls. In some cases girls worked without pay only to be discharged at the end of a learning period and new "learners" taken on. It was not uncommon for girls of sixteen to work eighty hours or more a week. In western Massachusetts, sweatshops were paying as little as one cent an hour.

The law had been framed to meet the objections the majority itself had raised in 1923 to the District of Columbia Minimum Wage. A model statute was the basis of the new minimum wage laws adopted by New York, New Jersey, New Hampshire, Connecticut, Ohio and Illinois. The remedy embodied in the law had proved a practical one, though it had its loopholes. In New York State the law was first applied to laundries, and median weekly earnings rose from $10.41 in May, 1933, to $12.12 in November, 1933, and to $13.32 in November, 1935. In Ohio median weekly earnings in laundries and dry-cleaning establishments had risen from $8.15 to $11.40.

In New York State there were 1,500,000 women employed in industry, 22,000 in the laundry business alone. Minimum wages were being fixed in hotels and restaurants when the Supreme Court held the law unconstitutional. There were 55,000 women employed in hotels and restaurants and some conception of their need for minimum wage protection may be gathered from the fact that one-fourth of

the waitresses in the state were earning not more than $4.00 a week.

Nor was there complaint from the industries to which the law had been applied. It had rationalized the laundry industry in New York State, increased its efficiency and ended disastrous price wars. H. K. Wilder, secretary of the Laundry Board of Trade of Greater New York, Inc., had declared that if the United States Supreme Court voided the law, "it will destroy much of the progress made within the last few years in the laundry business, tending toward the establishment of an economic bottom for wages, and will place responsible operators and employees generally at the mercy of the unscrupulous chiseler." As late as December, 1936, the New York State Department of Labor announced that all but three of the 800 laundries in Manhattan, and "a large number of laundry employers throughout the State," were voluntarily obeying the old minimum wage standards despite the decision of the Court.

New York's most conservative newspapers had expressed misgiving. The *New York Times* pointed out that "the New York Minimum Wage Law was carefully drawn and admirably administered. Unlike the NRA, it was not rushed through hastily and put into effect emotionally, to the accompaniment of parades and noisy 'crack down' threats. Minimum wages in the laundry and in the hotel industries were not adopted until after a board had carefully investigated the relevant facts. The minimum wages of the laundry industry, for example, were desired by the employers themselves to put a competitive 'bottom' to wage competition . . . the majority decision will

leave the states at sea regarding how they are to deal with the exploitation of women in industry." The *Herald Tribune* went so far as to intimate that Supreme Court decisions were not necessarily final. "The present decision," it said, "adhering so literally to the Adkins case of thirteen years ago, can hardly be regarded as the last word on this difficult question." The intimation, considering its source, was little less than revolutionary.

Hamilton Fish attacked the decision in Congress. He said the Republicans had freed three million Negro slaves and called on both parties now to "emancipate three million women and children workers . . . to defend women and children from chiselers and human rats who fatten on the blood of unprotected workers." He declared the decision worth a million votes to the Democrats. The Republican party sought to regain as many of these as it could by pledging itself in its platform to "support the adoption of state laws and interstate compacts to abolish sweatshops and child labor and to protect women and children with respect to maximum hours, minimum wages and working conditions." It said, "We believe this can be done within the Constitution as it now stands." The Court had thought otherwise.

The *Herald Tribune* had said, "With the general proposition that government, whether state or federal, should have power to fix minimum wages for women and children few can take issue." The American Institute of Public Opinion demonstrated that few did. Its straw vote showed majorities for minimum wage legislation in all parties, all special groups and—with the exception of New Hampshire and

Vermont—in all the states. The vote was 70 percent in favor of minimum wage laws.

"I believe," it was once said, "that those who profess horror at the intervention of the state for the protection of the weak lay themselves open to the suspicion that they are desirous of using their strength . . . for the oppression of the rest." The speaker was Bismarck, and the time was the 1880's. He was too radical, in 1936, for the Supreme Court of the United States.

III

The Roll of the Judicial Dice

In June, 1936, the Supreme Court declared State minimum wage laws, for men or women, unconstitutional. In March, 1937, the Supreme Court held State minimum wage laws constitutional as applied to women. The first decision was 5-4. The second decision was 5-4. One man, Mr. Justice Roberts, changed his mind, voted "Yes" instead of "No"; and, by changing his mind, changed "the Constitution." "The Constitution," Charles Evans Hughes once said on a different occasion and in a different context, "is what the Judges say it is."

The Minimum Wage decision of 1936 showed that rule by judges was backward. The Minimum Wage decision of 1937 showed that it was also capricious. "Under our form of government," Mr. Justice Sutherland said in his angry dissent from the 1937 decision, "where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional." The final word of the Court in June was "No"; its final word in March was "Yes." The Court, by its reversal in the midst of President Roosevelt's campaign to enlarge and liberalize its membership, brought both the finality of its decisions and their infallibility into question.

How does the Court determine whether or not a

law is constitutional? Dissenting opinions often accuse the Justices of reading their own prejudices into the Constitution. The Court insists that its function is merely that of a glorified auditor, checking new laws with the Constitution, regretfully reporting inescapable discrepancies. The Minimum Wage decisions provide a test of this, the official theory. Mr. Justice Sutherland voiced it when he said, ". . . if by clear and indubitable demonstration a statute be opposed to the Constitution, we have no choice but to say so."

The Court has succeeded in representing itself as an impersonal and impartial agency, a legal sorting machine, automatically separating the constitutional from the unconstitutional. Candor is a luxury the Court cannot afford. Had the five men who declared the New York Minimum Wage Law void been compelled to say, "Despite the views of the minority, as learned as we are in the Constitution, and despite the opinions of the President and of most of our legislators and of a majority of the American people, we hold minimum wage laws unconstitutional because we dislike them," the Court would soon be stripped of its power to veto legislation. The Court's strength has lain in its ability to disguise questions of personal opinion as questions of constitutional Holy Writ.

The Minimum Wage decisions made it difficult to maintain the old illusion. Minimum Wages had come before the Court on four major occasions, in 1917, in 1923, in 1936, in 1937. In 1917 they were held constitutional, in 1923 and 1936 unconstitutional, in 1937 constitutional again.

"The Constitution, by its own terms," the conser-

vative majority said in the 1923 case, "is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is."

Thus the Court in the very act of overruling the legislature denied that it was doing so. It represented itself as merely the instrument of the sovereign will of the people, declining to recognize as law what had been plainly enacted in violation of the Constitution.

The Court had succeeded in imposing this view of itself on the country. Unconsciously, it is in these terms that we visualized the operations of the Court. We pictured the vast marble mausoleum in which the Justices sat, black gowned on their high bench. Judicial errand boys hurried in with new laws from Congress and the state capitols. The Justices opened their Constitutions, laid down the new laws beside it, compared them line by line. In the 1936 Minimum Wage case, we imagined them fingering down the pages of the Constitution. We had been told that "clear and indubitable demonstration" was required before an act of legislation could be declared void. Did they come to a section headed, "Minimum Wages"? For we heard the announcement, "Unconstitutional."

The benefit of every possible doubt, the majority assured us, had been given the law before the word was spoken. "This Court," Mr. Justice Sutherland said in the 1923 decision, "by an unbroken line of

decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." On so clear a basis the Court indeed had "no choice but to say so."

Were this a faithful picture of the way the Court operates, judicial power would stir no major controversy. A Court that stood ready to enforce the Constitution, *the actual words of the Constitution,* while giving legislation the benefit of every doubt where the words are vague, would provoke little opposition. It was hard to believe, after the 1937 reversal, that this was indeed the way the Court operates.

Should Congress pass a law providing that every state was to have three Senators, or some states three and others four, the Court would not be criticized if it called attention to the clause of the Constitution which provides that every state shall have two Senators. The demonstration of unconstitutionality would be "clear and indubitable." Has this been true of the decisions holding social and economic reforms unconstitutional? Let us turn again to the minimum wage cases.

If we waited until the Justices had filed out of the courtroom and if we went up to the high bench and looked into their Constitutions for ourselves, we should find no reference to laundries or minimum wages or women. So far there would be no "clear and indubitable demonstration." The Court spoke of "liberty of contract." There is nothing in the Constitution about "liberty of contract." The Supreme Court said, "The right to make contracts about one's

affairs is a part of the liberty protected by the due process clause." In the Constitution we find two due process clauses. One is part of the Fifth Amendment, which says: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The other is in Section 1 of the Fourteenth Amendment, which says: "No State shall deprive any person of life, liberty, or property, without due process of law." Can a layman be blamed if he fails to see that "liberty of contract" is included in the words "due process" or in the word "liberty"? Nevertheless, if judges learned in the law say so, it must be so. And if they feel that "by clear and indubitable demonstration" minimum wage laws violate liberty of contract in the case of men and women, or in the case of men alone, it must be so.

But when the layman turns to judicial decision on minimum wage laws, he finds not "clear and indubitable demonstration" but the most bewildering diversity of opinion.

Minimum wage laws had been uniformly upheld in the State Supreme Courts, in all but one case unanimously, before 1923, and no State Supreme Court has ever ruled against minimum wage laws on the merits. Of the State and lower Federal court judges who passed on minimum wage laws before the 1923 decision, forty-two thought them constitutional, only seven thought them unconstitutional. If we assume that judges on the lower benches may not be so learned as those on the Supreme Court, one would still think a "clear and indubitable demonstration" clear enough even for inferior judicial minds.

Diversity of opinion continues on the Supreme

Court. On three different occasions the constitutionality or unconstitutionality of minimum wage legislation has depended on one man's position. Where the Court is closely divided, as it often is, the power of the fifth judge on either side is of imperial proportions, and his will becomes law, transcending the powers of President or Congress or the people at the ballot box.

Chance often plays a major part in our constitutional law. If Louis D. Brandeis, before his appointment as a Justice, had not taken part as counsel in the defense of the Oregon Minimum Wage law, and if he had not therefore felt honor bound to step aside when the law came before the Court in 1917, State minimum wage laws would probably have been constitutional all through the post-war decade. The vote on the Court would have been 5-4 in favor of constitutionality, a precedent would have been established, the reversal of 1923 would have been more difficult, the reversal of 1937 would probably not have been necessary. Instead, the case involving the Oregon statute was decided by a 4-4 vote, with Brandeis abstaining. On the Supreme Court a tie vote affirms the decision of the lower court from which the appeal was taken. The lower court decision upholding the act was thus affirmed. The statute was held valid. But the decision, as a tie vote, established no precedent.

If one of the justices of the District of Columbia Court of Appeals had not been ill when the District of Columbia Minimum Wage law came before that court in 1921, the law would almost certainly have reached the Supreme Court on appeal before June,

1922. In that case, minimum wage laws would have been declared constitutional. For in June of 1922 two liberals were replaced by two conservatives, Clarke by Sutherland and Day by Butler, both new Justices opposed to the minimum wage. The District of Columbia statute was held unconstitutional in 1923 by a vote of 5-3. Had it come before the Court in 1922, the minimum wage law would have been upheld, 5-3. Mr. Justice Brandeis still refrained from voting because he considered his association as counsel with the Oregon Minimum Wage Law too recent—a point of judicial honor less punctiliously observed by ex-railroad and utility attorneys on the bench.

Minimum wage legislation came before the Court in 1923 and again in 1936. Thirteen separate Justices sat in the two cases. Oddly enough, seven of the thirteen thought that minimum wages were constitutional; only six declared them unconstitutional. Unfortunately, of these six, five were on the Court in 1923 and five in 1936. But of the seven who favored minimum wage laws, only four were on the bench on either occasion: Taft, Holmes, Sanford and Brandeis in 1923, with Brandeis abstaining; Hughes, Brandeis, Stone, and Cardozo in 1936. What happens to "clear and indubitable demonstration" when questions of constitutionality are decided not by the words of the Constitution but by the fact that the Justices, like dice, turned up in the wrong numerical combination?

Nor can mere laymen be blamed if they do not see "liberty of contract" in the due process clauses, for we find the Justices differing among themselves as to

whether they *do* include "liberty of contract." We find Mr. Justice Holmes saying of "due process":

> The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no further than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists of forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that he lends. Statutes of fraud restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. Insurance rates may be regulated. . . . Finally women's hours of labor may be fixed; and the principle was extended to men with the allowance of a limited overtime to be paid for "at the rate of time and one-half of the regular wage."

I confess that I do not understand the principle on which the power to fix a minimum for

> the wages of women can be denied by those who admit the power to fix a maximum for their hours of work.

Nor can a layman decide whether the Justices are interpreting the Constitution or looking into a crystal ball for whatever they choose to see there, when he finds that five of the nine Justices in 1934 agreed with Mr. Justice Holmes—in so far as the right to regulate minimum prices is concerned.

In 1936 and 1937 it was Mr. Justice Roberts who held the key position, who was the king pin of the Court. The Supreme Court in the past has held that though legislative power may limit liberty of contract in some ways, wages and prices were protected by the due process clause from interference. In 1934 the New York Milk Control Law came before the Court. It set minimum prices to be paid the farmer for his milk, and minimum prices to be paid by the consumer. The law was meant to safeguard the earnings of both the farmer and the milk company, but its chief effect was to bolster the profits of the big distributors. The law was upheld 5-4, Mr. Justice Roberts writing the majority opinion. The majority ruled that fixing of minimum prices for milk was not unconstitutional, that liberty of contract was not absolute, that "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . ." What policy *is* the legislature free to adopt? Mr. Justice Roberts said for the majority, "So far as the requirement of due process is concerned, and in the absence of other

constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . The Courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it."

These are principles broad enough for the establishment of socialism. They would seem broad enough to allow minimum wage laws. But when the New York law fixing a minimum price for the labor of women came before the Court in 1936, Mr. Justice Roberts declined to apply the doctrine he expounded for the protection of milk company profits. In vain Mr. Justice Stone protested for the minority that the Milk Control decision "should control the present case" and establish the constitutionality of State minimum wage laws.

The inconsistencies of Mr. Justice Roberts are matched by the legalistic contortions indulged in by Chief Justice Hughes ten months later to make Mr. Justice Roberts' about face seem less extraordinary. To understand these contortions requires patience, and we hope the reader will bear with us while we unravel them. They help us to understand how fantastic the workings of judicial power have become.

In almost all the pre-war state minimum wage laws, Legislatures sought to placate the Courts by declaring that the statutes were passed to protect the "health and morals" of working women. The hostility of many judges to interference in economic matters was well known. It was hoped that the "health and morals" alibi would disarm them, especially since the Courts had been more tolerant toward

legislative intervention to prevent disease and immorality.

The District of Columbia Minimum Wage law was framed in this way. But when it came before the Supreme Court in 1923, Mr. Justice Sutherland for the majority objected to this very feature of the law. He said, "It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages. . . . The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business . . . the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. . . . The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. . . ."

Mr. Justice Sutherland went on to indicate a possible loophole for minimum wage laws. He said, "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things . . . is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United

States." (The naked, arbitrary act was, in this case, the fixing of a $16.50 a week wage. This was established in 1920 when prices and living costs were still high, as a result of the World War.)

It so happens that it is much more difficult to establish the "value" of a person's services than to determine how much he or she needs for food, rent and clothing. But since Mr. Justice Sutherland had said in 1923 that a law establishing a minimum wage on the basis of "value" would be "understandable," a model statute was drawn up on those lines in 1933. This model statute was adopted by most of the states enacting minimum wage laws in 1933 and after. It was the basis of both the New York and Ohio laws, and both provided that the minimum wage was to be a "fair" wage and that the "fair" wage "shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered." It was hoped that this would meet the objections of Mr. Justice Sutherland and his colleagues of the 1923 majority.

So much for the framing of the law. When the New York law came before the Court of Appeals, highest judicial body of that State, the Court of Appeals held it unconstitutional by a vote of four to three. The U. S. Supreme Court is bound by the construction placed on a state statute by the highest court of that state. The Constitution of New York contains a due process clause like that in the Federal Constitution. Had the New York Court of Appeals held the law contrary to New York's own due process clause, the Supreme Court would have been bound by the ruling of the New York Court.

But the majority on the New York Court of Appeals omitted any reference to the state's due process clause. It passed responsibility to the Supreme Court by declaring "we do not see wherein this Act differs materially from the Act of Congress ruled upon in Adkins v. Children's Hospital (the 1923 case) wherein it was held that the Minimum Wage Act . . . was an unconstitutional interference with liberty of contract. The interpretation of the Federal constitution by the U. S. Supreme Court is binding upon us; we are in duty bound to follow its decisions. . . ." The way was thus left open for the Supreme Court to reverse the 1923 decision if it so chose.

The Supreme Court chose instead to shift responsibility back to the New York Court of Appeals. It said "This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the state" and that since the state Court said the law was essentially the same as that in the 1923 case, the Supreme Court was not at liberty to consider the differences between the New York Law and the District of Columbia Law. But the pretense was abandoned when the Court later declared that "The state court rightly held that the Adkins case controls this one . . ." and went on to state that under the Adkins decision "the state is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid." The Court reconsidered the principles of the 1923 decision and upheld them.

The Supreme Court rarely reverses itself—at least

not openly. The same effect is achieved by "distinguishing" between one case and another. On appeal, counsel for New York State had sought to give the majority the graceful way out by stressing the differences between the New York law and the 1923 statute. It was hoped that the Court would seize on these differences to "distinguish" the two enactments, and to uphold the New York Minimum Wage law without having to admit that it was wrong in 1923. The emphasis was placed by counsel on the fact that the New York law had been framed to meet the objections of the Court in 1923. But the majority in the 1936 case took advantage of counsel's tactics to claim that reconsideration and reversal of the 1923 decision was not asked. It was this point on which Chief Justice Hughes seized in 1937 to explain the about face of Mr. Justice Roberts. The Chief Justice said that the Court in 1936 had not been asked to reverse itself, and was therefore unable to do so until the Washington Minimum Wage law came before it.

The feebleness of the device by which the Chief Justice sought to save face for the Court is obvious from an examination of the 1936 and 1937 decisions. For in 1936 the liberal minority (with which the Chief Justice joined) vigorously denied that the Court had not been asked to reconsider its 1923 decision. And in 1937 the conservative minority objected as vigorously that "the principles and authorities relied upon to sustain the judgment" (of constitutionality) had been fully considered and their "lack of application . . . pointed out" in both the 1923 *and* 1936 decisions. The Chief Justice raised another embarrassing question for the Court. If the

technicality he referred to had prevented a reversal in 1936, why had the Court refused New York's application for a rehearing, an application that emphasized not the difference between the 1933 and the 1923 statutes, but the need for reversing the 1923 decision?

The final twist in this judicial labyrinth was the action of a three-man Federal statutory court in Ohio. On November 20, 1936, less than five months after the decision in the New York minimum wage case, it held the Ohio minimum wage law constitutional on the grounds rejected by the majority of the U. S. Supreme Court and despite the fact that the Ohio law was virtually identical with the New York law.

The excuse of the Federal Court in the Ohio district was ingenious. The Supreme Court had declared itself bound by the "construction" placed on the New York law by the New York Court of Appeals. The Federal Court in Ohio thereupon stated that it did "not feel bound to follow the construction placed upon the statutes of any other state by the courts of such states." It held that the Ohio law was so different from the 1923 law as to be constitutional, despite the fact that the Ohio and New York laws were the same and the Supreme Court had said, "The state court *rightly* held that the Adkins (1923) case controls this one. . . ." (Italics ours.)

In this judicial Babel, what becomes of the "clear and indubitable demonstration" which the Court professes to require before it will hold a law unconstitutional? What becomes of the claim that the Court will not find a statute unconstitutional unless it seems so "beyond rational doubt"?

IV

A Gun in the Ribs

THE Court's first impulse, when confronted with new social or economic legislation, is to reject it. The Court tends to identify the Constitution with laissez faire, though it is no more consistent than the rest of us in applying the doctrine. Laissez faire, like castor oil, is something one prescribes for others. The Court is usually willing to approve the intervention of government in economic affairs for the benefit of business. It is reluctant to tolerate intervention for the benefit of workers or farmers, consumers or investors. The concept of "liberty of contract" and its application in the Minimum Wage cases is typical of judicial process. It merits our study, for it shows how the Court, under the guise of enforcing a general rule, throws its weight on the side of property in the economic struggle.

The Supreme Court of the United States, despite the 1937 reversal, still holds that minimum wage legislation for men, whether under Federal or State law, would violate liberty of contract. What is liberty of contract? Is a contract made under the threat of hunger any more free than one made at the point of a gun?

If a gunman held up Mr. Justice Sutherland and forced him to sign over his judicial salary, would the Court uphold the transaction as an exercise of "liberty of contract"? The legislature declares highway

robbery illegal. Is it forbidden to declare the sweatshop illegal? The legislature and the courts will not recognize a contract made under economic duress. *Does* the Constitution sanctify the "liberty of contract" that enables an employer to take advantage of a worker's need?

"Freedom of contract," the Supreme Court has held, "is the general rule and restraint the exception." There is no liberty of contract in the sense that there is liberty of the press. One cannot make a contract to commit a murder, or to drive down the left-hand side of the street. No one has ever asked the Court to declare traffic laws unconstitutional because they void or forbid contracts to drive an automobile without brakes, or at seventy-five miles an hour. In his dissent in the Adkins case, Mr. Justice Holmes said, "Contract . . . is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts." It is only in the case of labor and welfare legislation that the plea of liberty of contract is ever raised, and even this is of recent development.

Liberty of contract is not mentioned in the Constitution. The Supreme Court, as we shall see later, did not read it into the Constitution until 1897. It was not applied to labor legislation until 1905, when the Court held a New York law fixing a ten-hour day for bakers unconstitutional as a violation of liberty of contract. The Court has since abandoned this position in the case of maximum hour legislation, but only

partially in so far as minimum wage laws are concerned.

Liberty of contract in determining wages is comparatively new. In the Middle Ages wages were largely fixed by guild and custom; later, until the early part of the eighteenth century, by legislation. Since the 1890's minimum wage legislation and the growing power of trade unions have begun to set limits on the exploitation of labor. The Supreme Court rules against minimum wage legislation as an interference with the liberty of contract of the worker. But it is important to notice that the minimum wage limits the bargaining power of the employer, not that of the employe. It does not keep the worker from getting wages higher than the minimum. It does forbid the employer to pay wages lower than the minimum.

The liberty of contract upheld by the Court is not liberty of contract at all. It is the liberty of one party to a contract—the employer—to take advantage of his superior bargaining power to exact better terms from the worker than he could if there was equality of bargaining power between them. As one of the lower court judges who passed on the District of Columbia Minimum Wage Law said, "In a broad sense the act is not a wage-fixing measure, but a measure to prevent the confiscation of a working woman's labor by those who have the economic power to do it." The Supreme Court claims that it is upholding "the sacredness of the right of the citizen to freely contract his labor" and that supposed constitutional limitations protecting this supposed right "are for the protection alike of the rich and the poor, the strong and the

weak, the high and the low"; but the courts are really asked not to safeguard the equal rights of two equal parties but rather to choose between the right of the worker to a living wage and the "right" of the employer to make him work for less.

Chief Justice Smyth of the District of Columbia Court of Appeals, dissenting in 1922 from a decision holding the District of Columbia Minimum Wage Law unconstitutional, said, "It would seem that the right of this class ('women who must labor') to live on a barely decent level, and the right of the public to have them so live, should outweigh the right of those who do not need to work in order to live, and who therefore are merely asserting a right to earn money and thereby accumulate property."

Chief Justice Smyth's dissent brings out more clearly than any other the real intent of the law. The majority decision written by Mr. Justice Van Orsdel in the same court is franker than the Supreme Court. It reveals the motive of those opposed to minimum wages. Their purpose is not to safeguard the worker's freedom. It is to preserve the superior position of the employer in the wage bargain. Mr. Justice Van Orsdel wrote:

> Legislation tending to fix the prices at which private property shall be sold, whether it be a commodity or labor, places a limitation upon the distribution of wealth and is aimed at the correcrection of the inequalities of fortune which are inevitable under our form of government, due to personal liberty and the private ownership of property. . . . The police power cannot be em-

ployed to level inequalities of fortune. . . . The modern tendency toward indiscriminate legislative and judicial jugglery with great fundamental principles of free government whereby property rights are being curtailed and destroyed, logically will, if persisted in, end in social disorder and revolution.

It is significant that where forms of duress other than economic are concerned, the law does not concede liberty of contract. Several hundred pages of Williston's famous treatise on contracts are devoted to types of contracts the law will not recognize or enforce. The law will not enforce contracts made by taking advantage of infancy, fraud, mistake, physical or mental duress, lunacy or drunkenness. Nor will it recognize contracts contrary to public policy. In some states the aged may not contract, lest some one exploit their failing powers. A few states even forbid adjudged spendthrifts to make contracts, lest their weakness betray them.

Is economic compulsion sacred? One cannot take advantage of superior physical power. Why should one be permitted to take advantage of superior economic power? Many of the standards set or cited by Williston as to voidable contracts apply logically if not legally to wage bargains made under economic duress. Williston quotes from Pollock on Contracts:

> Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of

> the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by a court of equity to be undue influence, and is a ground for setting aside the act procured by its employment. . . . The real and ultimate fact to be determined in every case is whether or not the party really had a choice—whether "he had his freedom of exercising his will."

A great English judge in an often-quoted decision held that "necessitous men are not, truly speaking, free men." Was the Legislature of New York not justified in its preamble to the Minimum Wage Law: "Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers . . . standards such as exist tend to be set by the least conscionable employers . . . 'freedom of contract' as applied to their relations with their employers is illusory." May not the Legislature and the Courts recognize undue influence here, too, as justifying a limitation on liberty of contract? If the law may forbid contracts to gamble, contracts in restraint of trade, contracts to sell articles injurious to health, why may it not forbid contracts economically harmful?

In other fields of the law, the courts discriminate between employer and employee in regard to their contractual liberties. A contract or agreement among manufacturers to drive up the price of their products would be held in restraint of trade, but not an agreement among workmen to organize for higher wages.

Why should not the Legislature for the same reasons —the weaker bargaining power of labor and the intimate relation between good wages and public welfare—enact laws placing a minimum on wages for men as well as women?

The Supreme Court itself has permitted some limitations on economic duress in labor relations. It has upheld laws regulating hours, forbidding payment in scrip, regularizing payment of wages and establishing the method of computing wages due. In one famous case, in 1897, before the Court had thought of applying "liberty of contract" to labor legislation, the Court recognized the inequality of bargaining power between employer and employee. It said, "The proprietors lay down the rules and the laborers are practically constrained to obey them . . . the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality."

Why the Court should consider it a violation of liberty of contract to fix minimum wages, but not to fix maximum hours, has puzzled many members of the Court, including Chief Justices Taft and Hughes. "No one has yet attempted to say," Mr. Justice Stone wrote in his Tipaldo dissent, "upon what basis of history, principles of government, law or logic, it is within due process to regulate the hours and conditions of labor of women . . . and of men . . . and the time and manner of payment of the wage . . . but that regulation of the amount of the wage passes beyond the constitutional limitation; or to say upon what theory the amount of a wage is any the less the

subject of regulation in the public interest than that of insurance premiums . . . or of the commission of insurance brokers . . . or of the charges of grain elevators . . . or of the price which the farmer receives for his milk, or which the wage earner pays for it. . . ."

When the Court chooses, it recognizes changing conditions. In upholding zoning regulations, a serious limitation on property rights in the public interest, the Court held, "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive. . . . In a changing world, it is impossible that it should be otherwise." But the Court can be obdurate where legislation runs counter to its preconceptions or prejudices. Chief Justice Marshall wrote, "It is a Constitution we are expounding, a Constitution intended to be adapted to all the exigencies of human affairs." But Mr. Justice Sutherland said in his 1937 dissent, "the meaning of the Constitution does not change with the ebb and flow of economic events."

The real objection to recognizing and granting protection against economic duress is that it strikes at exploitation of labor. Economic duress—the need of the propertyless to eat—makes the wheels go round in our society. The Supreme Court, in holding unconstitutional a Kansas statute outlawing so-called "yellow dog" contracts in which employees promise not to join a union, said:

As to the interest of the employed, it is said by the Kansas Supreme Court to be a matter of a common knowledge that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, whenever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . It is self-evident that, unless all things are held in common, some persons must have more property than others; it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary results of the exercise of those rights.

But such legislation as minimum wages does not end economic duress or destroy the superior power of property over the propertyless. It merely limits them in the public interest. In this respect the liberal jurists are better defenders of property rights than the conservatives. Chief Justice Smyth said:

Much was said during the argument at the bar to the effect, if this statute is sustained, it will lead to Sovietism, etc. When statutes having that effect come up for judgment we shall deal with them. It is no part of our duty to engage in speculation concerning them now. . . . Con-

cerning Sovietism, however, I may say that I do not think the upholding of the act would have the tendency claimed. On the contrary, I am convinced the opposite effect would be produced, because the decision would demonstrate that this government, as framed by the Fathers, has ample power, and those invested with that power have the disposition, to protect the weak against the strong by administering justice to both. If the power did not exist, and the government could not interfere, but would have to stand supinely by while wrong dominated right, there might be some basis for a contention that a change is necessary in our institutions.

V

Can We Blame It on the Fathers?

CHIEF JUSTICE SMYTH was anxious to demonstrate that "this government, as framed by the Fathers, has ample power . . . to protect the weak against the strong." Others contend that the Fathers intended to *forbid* protection of the weak. Corporation lawyers have been working two generations to make over the Constitution and its framers in the image of their clients. They would have us believe that liberty of contract and the devil-take-the-hindmost philosophy with which they block social and economic reform were written into the Constitution by the Fathers.

"The Framers of the Constitution, of the Bill of Rights and of the Fourteenth Amendment," said the brief submitted by former Governor Nathan L. Miller of New York in the 1936 minimum wage case, "thought it would promote the general welfare to stimulate individual initiative and enterprise and to encourage self-respect and self-reliance. The proponents of minimum wage and similar legislation have a different social philosophy."

The philosophy attributed to the Fathers by former Governor Miller did not come into being until the latter half of the nineteenth century. Rugged individualism, as a system of ideas, did not make its appearance until Herbert Spencer had wedded the ethical implications of Darwinian biology to the economic observations of Adam Smith. Smith, in 1776,

was opposed to government interference in business. Darwin, in 1859, saw in the survival of the fittest the mechanism of evolution. Smith thought interference with the natural laws of economics clumsy and ineffective. Darwin's findings implied that interference with the natural laws of biology, by shielding the weak from the socially healthy processes of elimination, was a sin against progress. The combination of the two doctrines enabled the factory-owner to represent government interference on behalf of his employees as not only bad economics but as bad biology. Unrestricted exploitation was elevated by science to a necessity of nature, a duty the business man owed society. The race was strengthened when the weak fell exhausted, and righteousness marched hand in hand with dividends. But the Fathers had long been in their graves when Victorian optimism achieved this, its greatest triumph.

The Founding Fathers were primarily interested in the protection of property rights, but their conceptions of property and of contract were not those of a twentieth century corporation lawyer. They were influenced by the political philosophy of Locke, from whom stem the ideas of the Declaration of Independence and the American Revolution; and Locke did, indeed, believe in a natural right of property "anterior to government and morally beyond the reach of popular majorities." But the property in which Locke recognized a natural right was not the "property" of an Insull, a Van Sweringen or a Steel Corporation. Locke limited this natural right to the amount of property which one man could *use*. "The same law of nature that does by this means give us

property," Locke wrote in *The True End of Civil Government,* "does also bound that property to . . . as much as anyone can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in . . . as much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property."

Most of the Founding Fathers were lawyers. Most of them were familiar with Blackstone. To Blackstone liberty did not mean what it means to the corporation lawyer today. He says nothing about a right to trade, to do business, or to contract. To him liberty "consists in the power of doing whatever the laws permit."

Nor do we find support for the corporation lawyer's attitude in Adam Smith. He did not see the problem of labor relations in terms of liberty of contract. He recognized inequality of bargaining power between capital and labor, especially since restrictive laws were in force in his time against the organization of labor. "We have no acts of Parliament," he wrote, "against combining to lower the price of work, but many against combining to raise it." He had a clear-sighted view of the relative strength of the parties to any labor dispute. "In all such disputes," he wrote, "the masters can hold out much longer. A landlord, a farmer, a master manufacturer, a merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year, without employment. In the long run, the workman may be as necessary to his master

as his master is to him; but the necessity is not so immediate."

It is true that Adam Smith objected to the fixing of wages. But the laws he knew fixed maximum, not minimum, wages. Legislation of this kind had its origin in the shortage of labor after the Black Plague and was passed to protect employers from the greater bargaining power temporarily conferred on labor at the time by the scarcity of hands. Smith's principal objection to government interference in the wage bargain was a realistic one. It might have come from Marx. "Whenever the legislature," Smith declared, "attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. When the regulation, therefore, is in favor of the workmen, it is always just and equitable; but it is sometimes otherwise when in favor of the masters. Thus the law which obliges the masters in several different trades to pay their workmen in money, and not in goods, is quite just and equitable. It imposes no real hardship upon the masters. It only obliges them to pay that value in money, which they pretended to pay, but did not always really pay, in goods." A century later state laws forbidding the payment of workmen in scrip and store orders and providing for payment of wages in cash were declared unconstitutional by our courts as a violation of the "liberty of contract" supposedly held dear by the Founding Fathers.

The bench and bar, in its effort to block legislation that would limit property rights, economic power and corporate devices in the general welfare, cannot go knocking at the graves of the Fathers as Saul did

at the grave of Samuel. For the Fathers were familiar with a great variety of regulatory legislation, fixing prices, wages and standards. It is true that they lived in a period of transition when older forms of regulation were dying out and newer forms had not yet established themselves. But they were not brought up in the belief that laissez faire was the Eleventh Commandment.

Wage- and price-fixing statutes were not uncommon in the Colonies during the seventeenth and eighteenth centuries. During the Revolution at least eight of the thirteen states, at the suggestion of the Continental Congress and in an effort to combat the rise in prices due to depreciation of the currency, passed laws regulating the prices of virtually all commodities and the wages of labor. Maryland even fixed a maximum rate of profit. Pennsylvania's statute declared that it was fixing prices because "certain persons in the State, instigated by the lust of avarice and devoid of every principle of public virtue and humanity are assiduously endeavoring, by every means of oppression, sharping and extortion, to accumulate gain to themselves, to the great distress of private families in general and especially of the poorer and more dependent part of the community as well as to the great injury of the public servants."

Nor was such legislation limited to war emergencies. Assizes of bread and of other articles were common. An act of 1779 in Pennsylvania provided for the setting up of assizes in Philadelphia and in the other counties of the state to fix the weight and price of bread for sale. When the Legislature of Virginia passed "An Act for Incorporating the Town of Rich-

mond, and for Other Purposes" in May, 1782, it gave the officials of the town the power "of licensing tavern-keepers and settling their rates, appointing a clerk of the market, establishing an assize of bread, wine, wood, coal and other things. . . ." A Pennsylvania statute fixed the prices of flour, rye, Indian corn, barley, oats, and spelt, buckwheat and whiskey.

Virginia regulated the inspection of flour, bread and tobacco. In the case of tobacco, minute and detailed regulations were laid down providing for the establishment of public warehouses, fixing the pay of tobacco-pickers, setting standards for tobacco and regulating the dimensions of the casks in which it was to be exported. In May, 1782, Virginia passed "An Act to Continue and Amend the Act Intituled an Act for the Inspection of Pork, Beef, Flour, Tar, Pitch and Turpentine." The tobacco statute of 1782 has forty-seven sections and covers forty-one pages, even establishing the rate to be charged by the warehouses. There were colonial statutes which provided for the type of cellar in which private tanners must keep their leather, and for the proper method of currying the leather; statutes which provided for the registration of chimney sweeps and for their fees, depending upon whether the chimneys had one or two funnels; acts limiting prices in general; acts forbidding the exportation of bread and flour not merchantable.

The Fathers did not discuss "due process" or laissez faire or "liberty of contract" at the Convention. The only mention of contract in the Constitution is the clause forbidding the states to impair the obligations of contracts. A motion to put a similar restriction upon Congress was made by Mr. Gerry but it was not

seconded. It was made clear that this clause applied only to contracts already made, and did not limit the right of the legislature to place restrictions on future contracts.

Unfortunately, the corporation lawyer's attempt to picture the Fathers as proponents—a century ahead—of late nineteenth century rugged individualism drew new strength from Charles Beard's epoch-making *Economic Interpretation of the Constitution.* Dr. Beard showed that the Fathers were largely representative of creditor and business interests anxious to establish a government strong enough to foster commerce and curb the radical tendencies of many of the state legislatures.

The fallacy which springs from this view is particularly pernicious because it serves both radical and conservative purposes. The conservatives picture the Founding Fathers as bulwarks of property rights, establishing a stable government. The radicals picture them as counter-revolutionary plotters, undoing the heroic work of the Revolution.

It is true that the Fathers were men of property, and that the Constitution was in large part designed to further propertied interests. But it cannot be said that because the Fathers believed, let us say, in a man's right to own a home, that they also believed—a century in advance—in the right of a promoter to manipulate other people's money and property by means of holding companies. Nor can one conclude that because the Fathers believed in freedom they meant the freedom of a business man to take advantage of employees and the public in any way he chose.

It is clear that by liberty the Fathers meant what

is meant in Magna Charta: freedom from bodily restraint. The Englishmen who won the Great Charter were not interested in any freedom from legislative regulation. They were barons anxious to protect themselves and their prerogatives from the king. They were not business men seeking the liberty to work their employees twelve hours a day, or to sell engraved wall paper to widows and orphans as a gilt-edged investment. Business in England was regulated before Magna Charta and after. If the Fathers had wanted to establish the freedom of business enterprise from legislative supervision, they would have said so in the Constitution in plain English. The strained meaning given to "liberty" and "due process" to block social reform and labor legislation cannot be blamed on the men who gathered in Carpenter's Hall in 1789. They did not meet to frame a less perfect union.

VI

The First Hundred Years Were the Easiest

JUDICIAL supremacy, the most important problem of our time, is based on the theory, sedulously propagated by those to whom the Court is useful, that rule by judges is part of our system of government as it was established by the Fathers. This, the great American myth, does not survive examination.

In the lifetime of the Fathers, the Supreme Court only once overrode an act of Congress. That was in 1803, and the decision, unlike those in our time, did not narrow the powers of Congress or the President. It cut down the powers of the Court.

Not until fifty-four years later, in the Dred Scott decision, did the Court seek to limit the powers of Congress. The decision was reversed by Civil War, but remains a warning of the fatal consequences that may flow from rule by judges. If the Supreme Court had not declared the Missouri Compromise void (thirty-seven years after its enactment by Congress), it might never have been necessary to wipe out slavery by bloodshed. The march of industrialism into the South might have ended it peacefully; for free labor is cheaper than slave, and need not be fed three meals a day in slack seasons.

Ten years after it returned Dred Scott to bondage, the Court again refused to recognize the validity of an act of Congress. But this decision, like that in *Marbury v. Madison* concerned judicial processes as

much as it did legislative power. The statute overruled would have barred former soldiers or officials of the Confederacy from practicing as lawyers before the Supreme Court.

In 1870, in the first Legal Tender decision, the Court sought to deny the federal government the right to make paper currency legal tender in time of war. But Congress "packed the Court," increased its membership from seven to nine and, thanks to the two new judges appointed by Grant, both of them railroad attorneys, the Court reversed itself. The railroads, as debtors, were as anxious as the farmers to have the Legal Tender Act held valid so they could pay off their mortgages in "greenbacks" instead of gold.

It was not until the close of its first century neared that the Supreme Court succeeded in seriously interfering with popular mandate and Congressional power. In 1883, in the Civil Rights cases, the Court in part overruled the verdict of the Civil War as the War itself had overruled the verdict on Dred Scott. The Court could not undo the Emancipation Proclamation and the Thirteenth Amendment abolishing slavery, but it did emasculate the Fourteenth and Fifteenth Amendments by holding their enforcement acts unconstitutional and making it impossible for the federal government to give the freed Negro effective protection against Kluxers, lynching bees and grandfather clauses. How the Court later used the Fourteenth Amendment to free the corporation from legislative control comes later in our story.

Judicial supremacy traces its ancestry back to *Marbury v. Madison* in 1803, but its present exercise

and extent bears little resemblance to its forbear. *Marbury v. Madison,* which has taken on mammoth proportions in our constitutional mythology, seemed chiefly noteworthy in its time as evidence of Marshall's cleverness in evading what would have been a losing battle with Jefferson.

Marbury was one of the "midnight judges" hastily provided for by Adams to pack the judiciary with Federalists before Jefferson and his "Jacobins" could take power. Marbury's appointment was made by Adams on March 2, 1801, confirmed by the Senate on March 3 and sealed by Marshall as Adams' Secretary of State the same day. But on March 4 when Jefferson was inaugurated, the commissions were still in the Secretary of State's office and Jefferson ordered his own Secretary of State, Madison, not to deliver the commissions. Marbury asked the Supreme Court (on which Marshall had become Chief Justice) to give him a mandamus ordering Madison to hand over the commissions. Marshall knew he had no power to make Jefferson obey him. (Jefferson had a low opinion of Supreme Court Justices, especially those belonging to the Federalist party.) Marshall saved face by declaring that the section of the Judiciary Act giving him power to issue mandamuses in cases of this kind was "unconstitutional." This was the first and last time the Supreme Court ever rebuked Congress for giving it too much power.

It was not the last time the Court was to ignore the meaning of the Constitution as understood by those who wrote it. Beveridge in his life of Marshall informs us that the Judiciary Act was framed by one of the Founding Fathers, Ellsworth, later to be

Marshall's predecessor as Chief Justice. Eleven other Fathers were in Congress when the bill came up for passage. They all voted for it. "The Supreme Court itself," Beveridge says, "had held that it had jurisdiction, under Section XIII (of the Judiciary Act) to issue a mandamus in a proper case, and had granted a writ of prohibition by authority of the same section. In two other cases this section had come before the Supreme Court and no one had even intimated that it was unconstitutional."

Beveridge continues:

> As it turned out, but for *Marbury v. Madison,* the power of the Supreme Court to annul acts of Congress probably would not have been insisted upon thereafter. For, during the thirty-two years that Marshall remained on the Supreme Bench after the decision of that case, and for twenty years after his death, no case came before the Court where an act of Congress was overthrown; and none had been invalidated from the adoption of the Constitution to the day when Marshall delivered his epochal opinion. So that, as a matter of historical significance, had he not then taken his stand, nearly seventy years would have passed without any question arising as to the omnipotence of Congress. After so long a period of judicial acquiescence in Congressional supremacy, it seems likely that opposition to it would have been futile.

This period was not merely one of "judicial acquiescence" in Congressional supremacy. It was a

period in which neither public opinion nor private right looked to the Supreme Court, as we do now, to decide all our controversies. If the Fathers had so intended, would they not have been the first to bring before the Court the great controversies of their time? Louis Boudin, in his *Government by Judiciary*, the most comprehensive study yet made of the growth and exercise of the judicial power, points out:

> The most striking thing from our present point of view about the history of the United States is that from the time the question of the constitutionality of the first Bank of the United States arose in 1792 to the time of the decision of the Dred Scott case, a period of some sixty-five years, it never occurred to anybody to test these great constitutional problems in the manner in which they would be tested today—that is, by bringing them before the Court for decision. No opponent of the United States Bank, or of the Louisiana Purchase, or of the Protective Tariff, or of the annexation of Texas, as these questions were being solved by the statesmen in the halls of Congress, ever thought of calling for what is now the ultimate test of constitutionality, the opinion of the United States Supreme Court.

The Court was not, and did not dare to be, the final arbiter of our destinies during the first century of its history. The process of judicial usurpation was a stealthy one. Aside from the first Legal Tender case and the cases involving Negro rights, only eight acts of Congress were held unconstitutional between the

Dred Scott case and the death of Chief Justice Waite in 1888. But these were all statutes of minor importance. One made it a misdemeanor to mix for sale naphtha and illuminating oil. Another would have permitted prosecution of fraudulent bankrupts in the federal courts. A third sought to establish a system of federal protection of trademarks. None of these cases are comparable to the great decisions of our generation: the Child Labor cases, the Minimum Wage rulings, or the NRA, AAA and Guffey Act decisions.

The year 1883 marks the turning point. The Fourteenth and Fifteenth Amendments had been ratified to give federal protection to the newly freed Negro; the Civil Rights Act passed to enforce them. The Court in 1883 nullified the law and circumvented the amendments. It denied federal protection to Negro rights, *despite the amendments.* Henceforth no law, no matter how skilfully framed, and no amendment, no matter how plainly worded, was to be safe if the Court chose to hold otherwise.

But it was not until ninety-four years after the Constitution was adopted and eighty years after *Marbury v. Madison* that the Court realized it could call black white and white black without fear of correction.

VII

. . . *and the Most Liberal*

IT has become the fashion to blame the judicial veto of new social and economic legislation on ideas developed by the Court in the age of the oxcart, stagecoach, wheelbarrow, or horse-and-buggy. This view does an injustice to some dependable, if old-fashioned, means of conveyance. The Supreme Court of the United States was far more liberal in those days than it is today. The concepts that block social and economic reform are not the products of a benighted past in which ten miles an hour was a violation of the speed laws; but have been written into the Constitution in the past forty or fifty years, the age of the railroad promoter, the Model T Ford, the corporation lawyer and Class H Convertible Debentures in third-class holding companies.

The constitutional principles and canons of interpretation which characterize the Supreme Court under its first three great Chief Justices, Marshall (1801-1835), Taney (1836-1864), and Waite (1874-1888), would, if applied again in our own time, provide ample room within the framework of the Constitution for the economic and social reforms required to maintain the welfare and prosperity of the American people.

Marshall widened the powers of Congress. Taney increased the powers of the state legislatures. Waite laid the basis for both state and federal regulation

of business enterprise. The tendency in our day is for the Court to narrow the powers of both state and federal governments; the tendency in theirs was, with the exception of Marshall's rulings against State Rights, to increase the powers of both. A brief examination of the Court's work under these three great Chief Justices will help us to understand how far the Court has gone in the past half century to rewrite the Constitution in order to protect corporate privilege from democratic process; *and to overturn the liberal precedents established during the first century of the Court, because these liberal precedents would bring property rights under greater legislative supervision and control.*

Marshall and Broad Construction

Marshall made two contributions to our constitutional law that conservative jurists have tried their best to forget. He propounded a narrow view of judicial power and a broad view of Congressional power. The Court in our time has set itself up not only as a judge of what powers are possessed by legislature, but of how, when and where these powers may be used. Often, too, it denies Congress the exercise of a power in one instance because it might be abused in some other. In the Railroad Retirement Decision, Mr. Justice Roberts spent a large part of his time pointing out that if Congress forced railroads to give their employees a pension, it might also force the railroads to provide for their housing and the education of their children. Marshall said, "Questions of power do not depend on the degree to which it may

be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. . . . All power may be abused."

A comparison between a modern liberal jurist, Holmes, and the "oxcart age" conservative, Marshall, on the question of the taxing power, will disclose how great the Caesar of judicial power has grown in the last century. Holmes said, "Though the power to tax may be the power to destroy, it is not the power to destroy so long as this Court exists." Holmes was saying that the Court stood ready to prevent an abuse of the tax power. But Marshall, in *McCulloch v. Maryland,* said, "We are not driven to the perplexing inquiry, *so unfit for the judicial department,* what degree of taxation is the legitimate use and what degree may amount to the abuse of the power." He believed that protection against the abuse of a proper power lay not in the Courts but in the people. For he said in the same case, "It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, *to the utmost extent to which the government may choose to carry it.* The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

"We must never forget," Marshall said, "that it is a Constitution we are expounding" and he warned against the narrow construction which would render "the government incompetent to its great objects,"—

a warning his successors have forgotten. He used the clause of the Constitution which gives Congress power to make "all laws which shall be necessary and proper, for carrying into execution the foregoing powers" to uphold the right of Congress to establish a United States bank despite the complaint of counsel for Maryland that the Constitution gave the federal government no right to charter corporations and that this right was therefore reserved to the states by the Tenth Amendment.

Interesting in our time is the broad construction placed by Marshall on the commerce clause in *Gibbons v. Ogden* in contrast to the narrow view taken of it by the Supreme Court in the NRA and Guffey cases. Marshall refused to limit the definition of commerce "to traffic, to buying and selling, or the interchange of commodities," the Court's present position. Of the phrase, commerce "among the several states," he said, "the word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each State, but may be introduced into the interior. . . . In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. . . . The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. . . . What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed."

But what if this power is abused by taking control over purely intrastate and "local" matters? Marshall's

answer is not the answer of the Court today. He said, "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the Constitution. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which the people must often rely in all representative government." There is an echo of this in Mr. Justice Stone's dissent from the AAA decision.

Under Marshall's interpretation of the commerce clause, the federal government has ample power over agriculture and manufactures where the problems are of national concern. The Court, for all its deference to the memory of Marshall, refuses to recognize this, but Marshall's contemporaries did. Jefferson, eighty-two at the time of *Gibbons v. Ogden*, was horrified. "Under the power to regulate commerce," Jefferson said, "they assume indefinitely that also over agriculture and manufactures."

The warning with which Marshall ended his decision in *Gibbons v. Ogden* condemned, a century in advance, the conduct of the Supreme Court in our own time. He said:

> Powerful and ingenious minds, taking as postulates, that the powers expressly granted to the government of the Union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the

States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.

Taney and Police Power

Nor can the narrow constructionists who would cut down both state and federal powers to free property from social responsibility find comfort in the decisions of the Court under Taney. Taney for all his great error in the Dred Scott case, an error made in his old age by a man who had defended Abolitionists in his youth and set his own slaves free, was one of the most liberal jurists who ever sat on the Supreme Court. Felix Frankfurter has said of him what can be said of few Supreme Court Justices in our time, that he "had not that general animus against legislation which leads to frustrating interpretation." He opposed the granting of a new charter to the Bank of the United States because he feared "the evils and abuses which great money monopolies have always occasioned." He warned, as Jackson's Secretary of the Treasury (Taney was no Mellon), "against the unnecessary accumulation of power over persons and property in any hands; and no hands are less worthy to be trusted with it than those of a moneyed corporation." He saw the great issue of his time in the question whether "this noble country is to be governed by the power of money in the hands of the

few, or by the free and unbought suffrages of a majority of the people. . . ." In overturning the rule established by Marshall in the Dartmouth case, Taney refused to place a broad interpretation on corporate charters on the ground that ". . . the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish (by a grant of special privileges to corporations) its power of accomplishing the end for which it was created."

Taney's great work was the development of the police power. To its interpretation he brought the same narrow view of the judicial function that Marshall had. In our day the Court has sought to narrow the police power to the making of regulations protecting health and safety. Taney interpreted it broadly. His theory of the police power, if applied in our time, would provide basis for greater curtailment of property rights in the public interest. In his famous decision in the License cases, Taney asked:

> What are the police powers of a State? . . . They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominion. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its limits; in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limit of its dominion.

> It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except insofar as it has been restricted by the Constitution of the United States. And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the courts inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade.

Charles B. Smith says in his book, *Robert B. Taney: Jacksonian Jurist,* "Considered as a grant of power to the national government he construed the Constitution liberally; considered as a limitation on the power of the states, he construed it strictly."

The opposite is true of the Supreme Court today.

Waite and Public Interest

In 1869 a miniature New Deal movement, the Grange, swept the Middle West. "The State must either absorb the railroads or the railroads will absorb the State," was its battlecry. It forced laws through Middle Western legislatures to regulate the rates of railroads and grain elevator companies. It was attacked much as progressive movements have always been. The *American Law Review* called it "rank communism." The Granger legislation reached the Court in 1876.

One difference between the history of that older New Deal and the present one is that in 1876 the Court not only approved the legislation but developed a new doctrine which laid the groundwork for legislative regulation of business, *all business*. Had this doctrine not been abandoned later by the Court it would have provided useful power in dealing with economic problems, and it would have prevented the endless litigation by which our utility companies make effective regulation impossible.

In 1876 Chief Justice Waite in *Munn v. Illinois* and the Granger cases upheld regulation of both grain elevator companies and railroads on the ground that they were "affected with a public interest." The origin of the doctrine is obscure. It seems that one of the lawyers, looking for arguments against regulatory legislation, found one in a treatise on maritime law written by Lord Hale two hundred years before. A concept which the corporation lawyer adopted to narrow legislative power over business enterprise, was used by Chief Justice Waite greatly to widen legislative power. Mr. Justice Field protested in his dissenting opinion that "if this be sound law . . . all property and all business in the State are held at the mercy of a majority of its legislature." The conservative press was furious. The *New York Tribune* called the decision, "an advanced guard of a sort of enlightened socialism."

Chief Justice Waite's approach was as factual as that of a Brandeis. In the case of the grain elevators he showed that they exercised a virtual monopoly and fixed what rates they pleased. To answer the objection that the fixing of rates was a violation of the

due process clause in the Fourteenth Amendment, Waite reviewed the history of Congressional price-fixing legislation in this country under the due process clauses of the Fifth Amendment and the state constitutions and concluded that "down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. . . . The Amendment does not change the law in this particular." Chief Justice Waite then laid down the rule, supposedly based on Hale, that "property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large . . . and must submit to be controlled by the public for the common good," a rule broad enough to embrace most businesses, as Field was quick to point out.

Who is to judge whether or not a business is affected with a public interest? Waite's answer, and his answer was the answer of the majority, is: "We must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. . . . For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void. . . . But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

If a business may be regulated, are the rates ulti-

mately to be decided by the legislature or the courts? Waite's reply was, "The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation is implied. . . . This is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not the courts."

Similarly broad views of legislative power and narrow views of judicial power were expressed by Waite when in 1884 he came to write the decision in the last of the Legal Tender cases. He said, "A Constitution, establishing a frame of government, declaring fundamental principles, and creating a natural sovereignty, intended to endure for ages, and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract." He ended by declaring, "The question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the use of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question, to be decided by Congress . . . *not a judicial question to be afterwards passed upon by the Courts.*" The italics are ours.

We shall see what the Court did with these liberal precedents.

VIII

The Third American Revolution

THE Civil War, historians tell us, was the second American Revolution, shifting power from one class, the planter aristocracy, to an alliance of two other classes, the northern capitalist and the western free-soil farmer.

Between 1890 and 1905 there was a third American Revolution, a revolution by judges, little known, little understood. No property was damaged; no one killed. The *forms* of our government were left undisturbed.

Under the surface in that decade and a half many things changed. The conservative minority on the Supreme Court of the United States became the majority. Jefferson termed the Judiciary the "sappers and miners" of the Constitution. During this period they succeeded in subverting it. The Constitution as it had been interpreted during the first century of our history was in large part replaced by the cobweb of phrases—"due process," "liberty of contract," "confiscatory rate"—that block economic and social reform in our time. In the face of the rising demand of farmers and workers to curb the growing power of moneyed men and moneyed corporations, the Supreme Court was welded into the instrument American big business needed to evade democratic processes. Behind the veil of legal phrase, the Constitution was remade until it bore little relation, in so

far as labor and property relations are concerned, to the document framed at Carpenter's Hall in Philadelphia in 1789, or as expounded by the Supreme Court under Marshall, Taney and Waite.

The Supreme Court began to reign, as the Shoguns of Japan did, in the name of a Mikado that was its prisoner. The Supreme Court ruled in the name of the Constitution, but the Constitution became more truly than ever what the judges say it is.

Many saw in *Munn v. Illinois* a "socialistic" menace to property rights. In November-December of 1890 a distinguished New York lawyer wrote in the *American Law Review* of the new constitutional amendment made necessary by that decision if property in this country was to be secure from "populistic" assaults.

What of the Fourteenth Amendment, and its due process clause? Had that not been in the Constitution since 1873? Was it not all the protection property rights required? One would think so from the vantage point of 1937. In December of 1890 the present use of the "due process" clause as synonymous with laissez faire and an excuse for invalidating any reform legislation the conservatives on the Court dislike could be found only in minority dissenting opinions, beginning with that of Mr. Justice Field in the Louisiana Slaughter House cases in 1873.

A new amendment *was* needed, but the amending was done not by the people but by the judges. The revolution which was to change our Constitution in so far as social and economic legislation is concerned began on March 24, 1890, when in *Chicago, Milwaukee and St. Paul Railroad v. Minnesota,* the Court overturned the rule established in *Munn v.*

Illinois, a rule deriving from Marshall, that for the abuse of the regulatory power recourse must be had to the polls and not to the Courts. In 1890 the Court declared that "due process" gave it the right to review rates fixed by Legislature or regulatory commission; and to protect railroads and utilities from "confiscatory rates."

In the next fifteen years the Court was artificially to narrow the "commerce," "police power" and "public interest" concepts developed by Marshall, Taney and Waite, and to turn them into restrictions on, instead of means of widening, legislative power. At the same time they were to substitute a network of corporation lawyer phrases for the Constitution "due process," "liberty of contract" and "confiscatory," and by means of these concepts and by a new use of the Tenth Amendment, drastically to reduce the powers of both federal and state legislatures in dealing with economic and social problems, and vastly to increase the powers of the Court.

Since much of this story must now deal with the "due process" clause, it might be well to glance back at what the Court had always said "due process" meant in the past. In the Slaughter House cases in 1873 counsel objected that the establishment of a regulated slaughter house monopoly in New Orleans was a violation of the Fourteenth Amendment because it deprived other butchers of their property without due process of law. The Court objected that the interpretation placed upon the Amendment "would constitute this court a perpetual censor upon all legislation of the States." The Court in 1873 had no difficulty in disposing of the "due process" plea.

The Court referred to "the argument . . . that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law."

> The first of these paragraphs has been in the Constitution since the adoption of the Fifth Amendment. . . . It is also to be found in some form of expression in the constitutions of nearly all the States. . . . And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

The Court of the 1890's, in its task of remaking the Constitution to suit Morgans, Goulds, Vanderbilts, Rockefellers, Carnegies, Harrimans, did not let precedents deter it. In 1890 it held that "due process" gave it the right to act as a super-regulatory commission, to review railroad and utility rates. In 1897 it decided for the first time that "due process" protected "liberty of contract"; and later in the same year, though it upheld an eight-hour law for Utah miners as constitutional, it hinted that in the future it would hold any law it considered "unreasonable" a violation of the "due process" clause. In 1905 it went further. It held that a ten-hour law for New York bakers was an "unreasonable" interference with "liberty of contract" and therefore "unconstitu-

tional." In 1897, when the Court first read "liberty of contract" into the Constitution, it merely held that a state had no right to interfere with the liberty of its citizens to contract for insurance *outside* the boundaries of that state. By 1905 the Court ruled that a state could not interfere with "liberty of contract" even within its own borders unless the Supreme Court considered the interference "reasonable." And despite medical testimony it derided the idea that the baker's trade was unhealthy, and limitation of working hours to ten a day reasonable.

In that same year, in the famous case of *Smyth v. Ames,* the 1890 rule that the Courts could protect a railroad or utility against a "confiscatory" rate (*i.e.,* a rate that actually confiscated its property), became a rule that railroads and utilities had a right to a "fair" return on a "fair" valuation, with the Courts to decide what was fair in both cases. Mr. Justice Brewer indicated what he would consider a "fair" valuation. He would include the right to a return on the value of property given to the railroad by states or municipalities. (There were vast grants of this kind to the railroads.)

Nor was that all. Mr. Justice Brewer added:

> If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or

> management of the property. These, and many other things, as is well known, are factors which have largely entered into the investment with which many railroad properties stand charged.

This was an invitation to bad business practices and dishonesty, with the Court guaranteeing that the public would foot the bill.

The rule laid down by the Court in *Smyth v. Ames* in 1897 has made effective regulation impossible. The problem of valuation has become a nightmare; accounting, a branch of metaphysics. The possibility of appeal to the Courts on both questions of law and fact permit utility companies to enmesh regulatory commissions in endless litigation—at the expense of the public. A few horrible examples were collected by Mr. Justice Brandeis in his dissent in the St. Joseph's Stockyard case, April 27, 1936. One was the New York Telephone case. Protests over the company's increase in rates in the winter of 1919 led to fifteen years at litigation. Mr. Justice Brandeis gives us a glimpse of the work involved:

> Before the commission there were, between 1920 and 1926, 189 days of hearings, 450 witnesses were examined orally. The evidence introduced fills, in the aggregate 26,332 pages; and there were, in addition, 1,035 elaborate exhibits, one alone being in 22 volumes. Hearings were also held from January 24, 1930. The opinions of the commission in these proceedings fill 396 pages. In the District Court the hearings before the master occupied 710 days and ex-

tended over a period of four years; 609 witnesses being examined orally. They were recalled a total of 688 times. The evidence of that hearing fills 36,532 pages; and there were in addition 3,288 exhibits. The decree below was entered November 7, 1929. The company's counsel then labored two years in preparing a draft of the condensed narrative statement of the evidence required for the transcript of record on the appeal to this Court. On submitting this draft to counsel for the commission, the city, and the state, many errors were discovered. On 3,000 of the items counsel disagreed; months were devoted to composing the differences; and finally the items on which counsel could not agree were settled by the lower court. On November 14, 1933, more than four years after entry of the decree appealed from, the company filed here a record of 5,700 pages. On February 14, 1934, that appeal was dismissed.

No one need wonder why it is so hard to get a reduction in light, gas, heat or telephone rates.

The most amazing term of Court in this revolutionary period began in October, 1894. Our judicial Robespierres were ruthless, arbitrary, contemptuous of legal and constitutional precedents. By an interpretation of the commerce clause that would have shocked Marshall, the Court nullified the newly enacted anti-trust laws by holding that a trust controlling 98 per cent of the sugar manufactured in this country was engaged in "local" business and was not in restraint of trade. Though the Court has since

receded from this extreme position in so far as anti-trust laws are concerned, the notorious Sugar Trust case is still part of our constitutional law, the forerunner of the NRA and Guffey decisions. At the same time the Court turned about to give federal power over interstate commerce an unprecedentedly broad interpretation in order to legalize Cleveland's action in breaking the Pullman strike and jailing Debs. This was the first case in which the Supreme Court gave its blessing to the labor injunction. It derived the process from the law of nuisances. Labor unions *were* a nuisance to the corporations the Court served. It prided itself on testimony showing that the Court had broken the strike and it advised workers to seek redress of wrongs, not by strikes, but "through the courts and at the ballot box." In the Sugar Trust case it was the dissenting minority that quoted Marshall. In the Debs case it was the triumphant majority that invoked his broad interpretation of the commerce clause. The contrast between the narrow view taken by the Court to protect the rights of great business combines and the broad view taken to destroy the rights of workers runs like an ugly thread through the subsequent history of our anti-trust laws.

Finally, at that term and at the following term of Court, in two decisions, the Supreme Court held federal income taxes unconstitutional. Federal income taxes had been imposed in 1861, 1862, 1863, 1864, 1865, 1866, 1867 and 1870, and upheld by the Supreme Court of the United States. Every commentator on American constitutional law, including such outstanding conservatives as Kent, Story and

Cooley, had upheld their constitutionality. The Court waved these precedents aside as "a century of error," saving millions of dollars to the wealthy; for it was not until 1913, seventeen years after its final decision, that the Income Tax Amendment was adopted. From the Pandora's box of this case came another evil. A federal law of 1867 forbade any court to enjoin the collection of a federal tax. But the Supreme Court permitted the now familiar "stockholder's suit" device by which, instead of directly enjoining collection of a tax, it gives a stockholder an injunction forbidding his corporation to pay the tax. The Court showed that henceforth it would do as it pleased with both law and Constitution.

The executive committee of the Minnesota Farmers Alliance was in session when the Third American Revolution began in 1890. The committee greeted the news of the Minnesota rate decision as "the subjection of the people and the states to the unlimited control of the railroad corporations of the country" and a resolution was adopted appealing "from this second Dred Scott decision to the people of the nation . . . with a request that they unite with us in an effort to amend the Constitution so as to abolish this new slavery." It was too late. The vast trusts which began to dominate our economic system between the 1870's and the 1890's had finally begun to dominate the Courts. On them now sat men who had been the servants of these trusts. The fabulous wealth that poured from the continent at the touch of these great combines (the Carnegie interests alone made $133,000,000 in profits between 1875 and 1890) repre-

sented an irresistible power, able to twist newspapers, legislators, lawyers and judges to its purposes.

The money power might meet temporary defeat at the polls, but the Court was its citadel.

IX

The Method in Their Madness

In the realm of constitutional law, nothing is what it seems. It interferes with "liberty of contract" to fix minimum wages for men, but not for women. It violates "due process" to regulate the rates charged by an employment agency, but not those charged by an insurance company. It is "confiscatory" to scale down the valuation of a utility company in the light of a fall in prices when one is fixing the rates it may charge. It is "confiscatory" to *refuse* to scale down its valuation in the light of a fall in prices when one is fixing the taxes it must pay. The Constitution is of no help in this maze. For the Constitution says nothing about "liberty of contract," "confiscatory" raes or price-fixing.

Even in cases involving specific clauses of the Constitution, such as those revolving about the commerce power, the wording of the text is of little value. In the hands of the Court, the words mean one thing one day, another the next. The commerce power does not permit the federal government to interfere with mining, manufacturing or the relations between employer and employee. The Court says these are purely local matters. But these purely local matters become interstate commerce when a strike occurs, and the commerce power then allows the federal government to send strikers to jail.

It is this capacity of the Constitution to change

size, shape and color over night in the hands of its judicial keepers that caused so much confusion in the Guffey decision. One purpose of the Guffey Act was to insure fair working conditions and fair competitive practices in coal mining so as to make strikes, with all their attendant loss, unnecessary. The Court said this could not be done, that it was unconstitutional, that the federal government was interfering with affairs beyond its jurisdiction.

But when an Arkansas coal company broke its contract with the United Mine Workers of America, evicted its union employees from their homes and reopened on an open-shop basis, the Supreme Court declared the resultant strike illegal as an interference with interstate commerce and therefore punishable under federal laws. It fined the union $600,000.

The Constitution nowhere says that the federal government may foster manufacturing or agriculture. It does not authorize the imposition of a protective tariff. The South long contended that on a strict construction of the Constitution, a protective tariff was unconstitutional.

The Court has held that the federal government has a right to place taxes on imports even if the "incidental" effect is to tax the rest of the country for the benefit of our manufacturers; but that it has no right to place taxes on processors because the "incidental" effect would be to help farmers.

In its decision upholding a protective tariff the Court said it had no right to inquire into the motives of Congress. In its decision invalidating the AAA, Mr. Justice Roberts said for the majority that the processing tax even though not unconstitutional

in itself "cannot be wrested out of its setting, denominated an excise for raising revenue, and legalized by ignoring its purpose." But that is exactly what the Court did in the case of the protective tariff.

The NRA was held to be an interference with a "purely local business," in the case of the New York City poultry industry. But three years before, a racketeer who fixed prices in the same industry was held to be interfering with "interstate commerce," and in 1937 his conviction was again upheld by the Court. The layman can only conclude that the poultry business was "interstate" in 1932, "local" in 1935 and "interstate" again in 1937.

This is no isolated case of judicial inconsistency. In 1897, according to the Court, maximum hour laws were "constitutional" in the case of miners. In 1905, according to the Court, they were "unconstitutional" in the case of bakers. In 1908, maximum hour laws were "constitutional," but for women only. And in 1917 they were "constitutional" for both men and women. In 1918 minimum wage laws for women were "constitutional." In 1923 they were "unconstitutional." In 1936, they were still "unconstitutional." Ten months later, in March, 1937, they were "constitutional," but for women only.

No one ever knows what the Court will do next. Today the framers of the Constitution would be as puzzled as any Congressman as to whether a particular law, or application of a law, was "constitutional" or not.

The federal government can use its commerce power to prevent the shipment between the states of

lottery tickets, impure food and drugs, contraceptives, prostitutes, and stolen automobiles, but not to bar the products of child labor.

The distinction is purely artificial, and bears no relation to the Constitution or to the proper exercise of the judicial function, for the Judges are supposed to apply the Constitution, not make the laws. The late William D. Guthrie, for many years leader in the fight against the Child Labor Amendment, argued before the Supreme Court of the United States that the use of the commerce power to suppress lotteries was an unconstitutional interference with state rights. And the answer given in that case by James M. Beck as Assistant Attorney General, is the one the Fathers would have approved. He said the right to regulate included the right to prohibit and that "the power to prohibit is absolute, and the legislature is the final judge of the wisdom of its exercise." He said, "Steam and electricity have woven the American people into a closeness of life of which the framers of the Constitution never dreamed, and the necessity for federal police regulations . . . becomes increasingly apparent."

Judicial decision rarely went much further in the first hundred years of our history than an examination into what *powers* were given the Legislature by the Constitution; and Marshall denied, as did Taney and Waite, that the Courts had a right to decide how, when and where the power could be exercised, or what motives led the Legislature to exercise the power. For these are all legislative, not judicial questions.

But it is only the fact that the Court now acts as

a third House of Congress, as a super-legislature, as an American House of Lords, and no longer as a court, that can explain many of these constitutional inconsistencies. The Court has held, for example, that the Constitution permits Congress to use its taxing power to drive state bank notes out of existence, to make unprofitable the sale of certain injurious dairy substitutes, to discourage the sale of narcotics, to force grain markets to accept federal supervision and to give special privileges to farm cooperatives. But the Court held that the Constitution did not allow Congress to use the taxing power to render the employment of child labor unprofitable. This is legislation, not adjudication.

The Court is continually extending its own powers, and limiting those of the other branches of the government. When it condemns a law, the condemnation is made as sweeping as possible, often shutting whole areas of jurisdiction to either state or federal action. Our constitutional law is full of No Man's Lands. When the Court approves a law it tends to do so in such narrow terms that we often discover later that the "liberal" decision, while a victory on the specific question at issue, has laid the basis for greater judicial power and narrower legislative power than ever. This was the case in 1897 in *Holden v. Hardy* where the Court upheld the first maximum hour law to come before it but reserved the right to veto future maximum hour laws if it considered them or their circumstances "unreasonable."

The Court's present position is that any law which it considers "arbitrary, unreasonable or capricious" is a violation of the "due process" clause, a view that

would have astounded the Fathers, and a device that makes it possible for judges to void any law they dislike. This catch-all use of the "due process" clause is traced to the minority opinions of the great conservative Justice Field (appointed by Lincoln). But we find even Mr. Justice Field saying as late as 1885 that the Fourteenth Amendment was not "designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity." Mr. Justice Field, the most famous and most influential conservative who ever sat on the Supreme Court, served from 1863 to 1897. It is significant that he, a conservative, was the great dissenter of his day as Holmes and Brandeis, liberals, were the great dissenters in their day. It shows how far to the Right the Supreme Court has shifted in the last two generations.

Between 1887 and 1911 only three laws were held unconstitutional as a violation of "due process." In the six years from 1920 to 1926 more laws were declared unconstitutional under this clause than in the entire preceding fifty-two years during which the Amendment had been in effect. The Court had become, as Mr. Justice Miller said it would, if it abandoned the meaning that had always been applied to "due process" in the past, "the perpetual censor" of legislatures.

What is the method in the judicial madness that interprets the same words one way on one day and

another way the next? One fact to be kept in mind is that it takes a long time for judges, trained as they are in the law, a conservative profession by its nature, to get used to a new idea. Mr. Justice McKenna once protested against "that conservatism of mind which puts to question every new act of regulating legislation and regards the legislation as invalid or dangerous until it has become familiar." An example is federal regulation of the railroads. Congress provided for it in 1887 by the Interstate Commerce Act. The Court could hardly declare, ingenious as it has been, that railroad transportation was not, at least in part, interstate. But for sixteen years the Court interpreted the powers of the Interstate Commerce Act so narrowly that the I.C.C. was of little value. The Court would not allow it to fix railroad rates, though that is what Congress intended it to do. The Court would not allow it to end the railroad practice of charging more for a short than a long haul, a serious abuse in its day and one of the practices the Act was passed to end. But gradually the Court grew accustomed to the idea of railroad regulation. In 1913 it gave the I.C.C. power to fix intrastate rates. In 1930 it permitted the federal government to enforce collective bargaining on railroads (though the decision came so many years after the strike involved that the union which brought the appeal benefited little from the decision).

The chief clue to the maze of inconsistencies that is our constitutional law is a simple one. The Court and the law are primarily concerned with the rights of property, and of those who own property. The law does not protect one's right to eat, or to work, or

to have babies, though these answer to fundamental needs in human nature. The law is chiefly concerned with the right to acquire, hold and use property. In our day property has taken a new form. Corporate devices now make it possible for the few to control and use the property of the many through the corporation and the holding company. Lawyers have become the servants of corporations, not the officers of courts. With the growing power of concentrated wealth, a concentration many of the Fathers feared, the rift between property and democracy grows wider, and one must ultimately control the other. The bar and the bench stand largely on the side of property. Their suspicion of democratic processes is an old one. "My opinion," said Chancellor Kent in the 1830's when conservatives fought hard to prevent extension of the franchise, "is that the admission of universal suffrage and a licentious press are incompatible with government *and security to property.*" The first impulse of the Courts is to void or hamstring legislation that cuts down property rights, and in particular those rights to control other people's property through the corporate form. It is not concerned with the stockholder who *owns* these new forms of property. "The corporation," the Supreme Court once said, "is a non-conductor that makes it impossible to attribute an interest in its property to its members." An Insull, a Kreuger, a Van Sweringen or a Hopson would approve.

Nowhere have the Courts shown their true character better than in the enforcement and interpretation of the anti-trust laws. Vast corporate combines controlling huge sections of industry, dominating

them and dictating their prices and practices, have received the blessing of the Court, while struggling unions of laboring men striving with these giants for bread have been severely punished, huge fines imposed upon them, their officers jailed. What the law said, what Congress intended, was of no moment to the Court. To achieve its purpose it ignored both. It shut its eyes to fact. It developed a "rule of reason" to emasculate the acts as far as Big Business is concerned. The effect of its interpretation of laws designed against bigness in business has been to encourage larger corporate combines than ever. On the other hand, it put the anti-trust laws to a purpose Congress had never intended, the breaking of strikes, and continued so to use them despite the Clayton Act which specifically exempted labor unions from the operation of the anti-trust laws.

When the San Francisco Builders' Association brought pressure on non-members to obtain building supplies, the Court found no restraint of trade. But when stone-cutter unions organized to fight an anti-union drive by certain limestone companies and refused to work on stone provided by these companies, the Court enjoined the unions under the anti-trust laws from defending themselves. The decision was in 1927, thirteen years after the passage of the Clayton Act which Congress framed to exempt labor unions from the anti-trust laws and to end the abuse of the labor injunction.

A famous Brandeis dissent said of this case:

> The Sherman [Anti-Trust] law was held . . . to permit capitalists to combine in a single cor-

poration 50 percent of the steel industry of the United States, dominating the trade through its vast resources. . . . The Sherman law was held . . . to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. It would, indeed, be strange if Congress had by the same act willed to deny members of a small craft of workingmen the right to cooperate in simply refraining from work when that course was the only means of self-protection against a combination of militant and powerful employes.

X

Mumbo Jumbo

1

THE Justices of the United States Supreme Court are America's medicine men. Our constitutional law cries out for treatment by an anthropologist. It is full of taboos, myths and magic incantations. Its preconceptions have sunk into the darkness of our unconscious, until our responses are as automatic as touching wood for good luck, or walking around a ladder.

An American anthropologist might spend years trying to discover why Polynesians throw salt over their left shoulder at the dark of the moon. He would find that the Polynesians have been doing it so long that they are no longer conscious of it. When questioned they insist that the practice maintains fertility, wards off invasion and keeps up the price of cocoanut oil.

A Polynesian anthropologist would be as puzzled by the taboo in our word "unconstitutional." He would see a certain reform demanded by the American people, a law embodying it finally passed by Congress. He would note that Congress is largely made up of lawyers, all of whom have spent time studying the Constitution. And he would learn that, despite our belief in democracy, a few elderly men or a mere majority of them, could override the

will of Congress and country by pronouncing the word, "unconstitutional."

What is the magic in the word "unconstitutional"? The official myth is that Congress is made up of representatives of the people, while the Constitution was framed by the people themselves; that the will of the people's representatives must give way before the will of the people. The Supreme Court merely compares the two documents and lets the country know when one clashes with the other.

We have already seen that this picture—the official picture—of the Court as a glorified proofreader, comparing the law with the Constitution, does not fit facts. Nor would the view that the Constitution represents the direct will of the people survive examination by a Polynesian anthropologist free from the preconceptions of our society. He would find that the Constitution was written a hundred and fifty years ago, and could not represent the will of people living today. He would find that even a hundred and fifty years ago the Constitution was framed not by the people themselves, but by fifty-five men who had no legal authority to write a Constitution, did their work behind closed doors and, despite the very limited franchise of the time, barely succeeded in getting it adopted by the country.

If the average Polynesian once neglects to throw salt over his left shoulder at the dark of the moon, his conscience haunts him forever. Vested interests have grown up about the superstition. Abandonment of the custom would cut into the profits of the salt merchant, and the salt merchant is a pillar of the local medicine man's church. A special brand of salt

is prescribed for the sacred rite, and its price is higher. If any Polynesian is ever depraved enough to raise questions he would be told that the rite could be understood only by his betters, able to read the ancient books, and he would be set down as a potential agitator, who had succumbed to alien influences.

An anthropologist would uncover a not dissimilar situation in the United States. He would see Men of Property giving liberally to Legal Medicine Men, awesome fellows wearing chains of gold across their rotund bellies. He would hear these medicine men, in return, expounding a sacred text, the Constitution, and the sacred commentary on it, constitutional law, for the benefit of these men of property. He would find the whole process carried on in a language the common people could not understand. History gives us many examples of sacred texts in languages incomprehensible to the common people: Hebrew, Sanscrit, Greek, Coptic, Latin, Old Slavonic. Our sacred language is the gibberish of constitutional law. The medicine man, in response to questions about the usefulness of throwing salt over the left shoulder at the dark of the moon, mutters abracadabra. The lawyer and the judge—our Medicine Men—explain to the worker whose salary has been cut that under the rule established by *Abercrombie v. Zilch,* 23 U.S. 318, 74 Sup. Ct. 62, 97 App. Div. 19, 34 Ct. Com. Pl. 712, unless he can obtain a writ of *certiorari* on a *fieri facias* the ancient maxim, *rebus in rem nihil obstat,* will leave him to feel the full effect of the due process clause, and the fee will be

$25 (or $2500) sir, good morning, sir, and thank you.

Mumbo jumbo makes it possible for five men on the Supreme Court to rule a nation of a hundred and thirty million.

2

Every people has its sacred text and a priesthood to expound it. We have the Constitution, and the Supreme Court.

Great corporate property interests in the United States are using the "Constitution" and the sanctity of the Supreme Court as social myths to buttress their position against the forces of change. It is significant that these myths took on their present form and power with the rise of the corporation to dominance in the last quarter of the last century.

A number of diverse conceptions are mingled in our American myth. One is that of a higher law, binding all earthly powers. Another is that of the social contract as an embodiment of that higher law. The third is that of the Constitution as the social contract framed by the American people at a solemn moment in their history to be their basic law.

In the expounding of the Constitution by the Supreme Court in the interests of the corporation, a new form of social productive relation, in which the owners are often without power and the managers without responsibility, is presented in the guise of property as it was a century ago. A mass of intangible corporate "rights" are anointed with all the emotional connotations of home and fireside.

Behind judicial supremacy is the concept of a

higher law. If there is a higher law to which all earthly sovereigns are subject, then their sovereignty is limited. And if there is a higher law, then the subject has not only a right but a duty to resist if his sovereign oversteps its bounds. Hence flow the doctrines of inalienable rights and of the right of revolution which have played so prominent a part in English and American society since the seventeenth century.

The value of the idea of a higher law to the party, class or faction out of power is obvious. It is a means of curbing sovereignty and excusing revolt. It has been used for this purpose by many different factions in many different situations. The councils used it against the popes, Jesuits against Gallican monarchs, Protestants against Catholic kings, the King against Parliament, Parliament against the King, Lord Coke against both, the Levellers against Parliament, the American colonists against the Mother Country, colonial financial interests against debtor legislatures, and corporate plutocracy against the curtailment of its privileges by democratic social reform. Like the doctrine of State Rights, which plays a similar role in curbing the power of the party which controls the federal government, it is an instrument of struggle rather than a doctrine consistently held. The *ins* tend toward absolutism, the *outs* toward "inalienable rights."

The rising middle classes in the work of Locke and Rousseau developed the theory of the social contract as their concept of a higher law. They used it to curb the power of the monarch and to free enterprise from the remnants of mercantilistic and feudal restraint.

It is interesting to note that they envisaged social contract and inalienable rights as freedom from *arbitrary* action, not regulatory legislation, as in our own day. From the social contract springs the idea of a written constitution as a social contract and a constitutional convention as that *moment* when free men enter into a solemn agreement to govern their relations so long as that society endures.

If this document, the Constitution, is the fundamental law, then the organ of the state which has the final power to interpret this law and to say what it really means, is the dominant organ of the state.

In its original conception the idea of a social contract was "Protestant," in the sense that it regarded the individual conscience as the final judge of action. The right of revolution when government exceeded its powers under the constitution was and is still today an individual right.

At least as late as Jackson, it was widely held in this country that each branch of the government had a right to interpret for itself the Constitution its officers had sworn to uphold.

The view that the Courts are the final repository of the power to decide the true interpretation of the fundamental law has its origin in Lord Coke in the seventeenth century. He based it on common law precedents, since shown to have been, in some cases, false, in other of dubious applicability. The two major attempts of the British courts in that century to exercise judicial supremacy, the Shipmoney Case and *Godden v. Hales,* are closely linked respectively with the Revolutions of 1641 and 1688. From the time of the Glorious Revolution English Courts abandoned

any attempt to exercise this power and the Legislature has been supreme.

The doctrine of judicial supremacy is now purely American and almost entirely unknown elsewhere, except in countries with a federal form of government. There federal courts do have jurisdiction over the conflict of laws and the right to set aside state laws that conflict with federal law.

How did this power of the American courts originate? There are instances in our colonial period of attempt by the courts to exercise the power. When in one controversy the courts sought to void legislation for the benefit of debtors, their action was criticized. On the other hand in the famous case of the Writs of Assistance, the Courts were appealed to unsuccessfully against the actions of the British Legislature and of the royal agents. The latter were held to have violated fundamental law and the liberties of Englishmen. But the Courts declined to act. The contrast between the readiness of a colonial court to safeguard property rights and its unwillingness to defend personal liberties is characteristic of our judiciary.

The Court's theory of the Constitution as the expression of the sovereign will of the people was set down in Vanhorne's *Lessee v. Dorrence,* 2 Dallas 308 (1795): "The Constitution is the work or will of the people themselves, in their original, sovereign and unlimited capacity. Law is the work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature." Yet this was obviously a mythical picture of a Constitutional Convention which ex-

ceeded its legal powers, and was representative only of the great landowning and commercial classes.

The Court's view of itself as the final interpreter of the Constitution was summed up in *Marbury v. Madison.* "If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

But *Marbury v. Madison* was a case in which the Court interpreted the Constitution for itself *in so far as its own powers as a Court were concerned.* It refused to exercise a power granted it by Congress. It held the grant unconstitutional. It was not until long after that the Court sought to limit the powers of *other* branches of a government that was supposed to be a government of checks and balances, not Rule by Judges.

3

Whether the Fathers ever intended the Courts to set aside laws as unconstitutional is dubious. There is no express authorization for it in the Constitution. It would be wearisome to go over the threadbare controversy as to the intentions of the Fathers. If some of them thought the Court might some day refuse to enforce a law that violated a clear provision of the Constitution, as if a President sought to serve six years or a state tried to elect three Senators, certainly none expected laws to be voided on the basis of phrases so vague that they can be made to yield any meaning. They would have regarded the present use

of the "due process" clause as a constitutional monstrosity.

Judicial Supremacy has become an American religion. It penetrates every cranny of our society. The Court sets aside acts of Congress. It voids acts of state Legislatures. It rewrites constitutional amendments. It is super-regulatory commission and super-tax assessor. And criticism of the Court is close to blasphemy.

XI

The Hobgoblins Will Get You. . . .

THE last resort of those who oppose curtailment of the Court's powers is to trot out the hobgoblin of fascism. "True," they say, "the Court has been backward, slow to change, overfriendly to property rights; but one of these days we may be glad to have a 'conservative' court to protect our civil liberties from the assaults of a would-be dictator." The picture is persuasive, until one begins to fill in the details. The effort to visualize Justices Sutherland, Van Devanter, McReynolds, Butler and Roberts throwing up judicial barricades in defense of Mr. Earl Browder or Mr. Norman Thomas requires a robust imagination.

The Court can scent communism several centuries down wind, in a federal income tax or in a minimum wage for chambermaids. We suspect that it will be less alert to the menace of fascism. "The court," one Liberty Leaguer informed us during the last presidential campaign, "is the only safeguard of rights that stands between the public and a dictatorship." If the Court were our only safeguard, the *Heil* and the goose-step would have established themselves here long ago.

The decisions of the Supreme Court of the United States demonstrate that a written Constitution is no safeguard of fundamental liberties when its final interpretation is left in the hands of judges so arrogant

and powerful that they can misread or ignore its guarantees with impunity.

A mere reading of the Constitution is no longer a safe guide to what constitute the fundamental liberties of the American people.

The Constitution specifically guarantees the right to indictment and trial by jury, but the Supreme Court says otherwise. The Constitution is now what the judges say it is, and indictment and trial by jury are no longer fundamental liberties of the American people.

The Constitution specifically guarantees freedom of speech, press and assembly against Congressional limitation. The "spirit of our institutions," so often appealed to by the Supreme Court to uphold property rights (some of them fraudulent), certainly protects them against interference by any agency of government, federal or state. If the "liberty" safeguarded by the Fourteenth Amendment includes a washlady's "liberty" to work for less than a living wage, it certainly includes the liberty of Americans to speak, write and assemble in freedom.

But the Supreme Court has been as *unwilling* to apply the clear letter of the Constitution and its spirit in defense of civil liberties as it has been willing to twist, stretch, pervert, or ignore the letter and spirit of the Constitution to uphold property rights, no matter how spurious in their origin or harmful in their exercise.

From the days of the Alien and Sedition laws under Adams to those of the criminal syndicalism and anarchy laws still on the statute books of many of our states, the Supreme Court has only once declared

unconstitutional a law used to suppress political liberties. That was in 1931 when it held void a California law forbidding display of a Red flag, a statute of minor importance compared to the California Criminal Syndicalism law under which strikes have been broken and American citizens arrested, beaten and jailed.

The word "liberty" in the Fourteenth Amendment has been extended to fantastic lengths to cover the "liberty" to work for less than a living wage; but it was not until 1930 that the Supreme Court of the United States finally held that this "liberty" also included the liberty to speak, write and assemble freely. The Court did so in defending a racketeer tabloid weekly in Minnesota, a gutter sheet, fascist and anti-Semitic.

It was not until 1937, one hundred and fifty years after the adoption of the Constitution, that the Supreme Court of the United States ever upheld the freedom of press, speech or assembly in a case involving a radical—a man sentenced to seven years in jail under the Oregon Criminal Syndicalism law for taking part in a meeting to protest the illegal police raids by which Portland police sought to break the longshoremen's strike in 1934.

Even this decision, at its best, is a shabby one; at its worst, a new menace to civil liberties. In dealing with property rights the Court is sweeping. In the Schechter case it did not take care to limit its decision to the poultry industry, it threw out the NRA in its entirety. But in the case we are discussing, *de Jonge v. Oregon,* it was careful to state that it merely found the application of the Criminal Syndicalism Law un-

constitutional as applied to this particular case. It remanded de Jonge to the state Courts for further action, and it implied that if de Jonge were convicted of being a member of the Communist party (although it is a legal party in Oregon), or of recruiting members for it, or of distributing its literature, instead of merely taking part in a protest meeting under the party's auspices, the Court might look favorably upon the conviction. If this happens, the Court will have gone further than ever before in curtailing fundamental liberties.

Let us return to the question of jury trial and indictment, for these involve ordinary folk; the attitude of the judges is not distorted by prejudice, or warped by mob spirit. The constitutional provisions are so detailed, the intentions of the Framers so well known, the historic nature of jury trial and indictment as part of due process so well understood, that a Court which could ignore them—as has the Supreme Court of the United States—is a potential instrument of oppression, not a guardian of basic liberties.

The Fathers placed great stress on jury trial. Article III of the Constitution says, "The trial of all crimes, except in cases of impeachment, shall be by jury. . . ." But ratification of the Constitution could only be obtained by the promise to add a Bill of Rights, the first Ten Amendments; and bitter experience led the people to insist on further guarantees. The Fifth Amendment, guaranteeing due process of law, specifically provides that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of grand jury. . . ." The Sixth Amendment is a detailed guarantee

of fair trial, ". . . the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Of the right to indictment by grand jury, one of the greatest of American jurists, Chancellor Kent, wrote:

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

In the Hurtado case a man convicted of murder and sentenced to be hanged without having first been indicted by a grand jury appealed to the Supreme Court. The Court admitted that "due process of law" was understood by the Fathers to include indictment by grand jury. But in this case, as in so many others where human liberties are concerned, the Court became "progressive." It developed a sudden horror of blocking change. It said that to hold grand jury indictment essential to due process would

be to render the law "incapable of progress or improvement." It declared that indictment by grand jury was not a fundamental liberty. Hurtado was hanged.

Later, in another case, the Court held that "trial by jury has never been affirmed to be a necessary requisite of due process." In the Mankichi case a death sentence was upheld though the defendant had never been indicted and although three of the twelve jurors were for acquittal. "The two rights," the Court said, "alleged to be violated in this case are not fundamental in their nature." Mr. Justice Harlan dissented.

"It is a new doctrine," he said, ". . . that the Framers of the Constitution did not regard these provisions . . . as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted . . . but for the promise . . . that immediately upon the adoption . . . amendments would be proposed and made that should prevent the infringement . . . of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights according to universal belief at that time were those secured by provisions relating to grand and petit juries."

The Constitution says that indictment and trial by jury are fundamental liberties. The Supreme Court says they are not. The "Constitution" we live under is what the judges say it is.

The extent to which the Court has whittled away constitutional guarantees of our fundamental liberties is not generally understood, for these liberties

have been enforced not by judicial decree but by the spirit which dominates our institutions and our people. If the love of liberty, and that readiness to compromise and conciliate that makes democracy and free government possible, should ever give way on a large scale to the mob spirit that has made its appearance in isolated and exceptional cases; if moneyed powers should some day be able to remake America in the image of the company town, turning the descendants of the men who responded to the Declaration into hysterical helots, the Court will be the willing servant, not the opponent, of reaction. Its record on civil liberties is incredibly bad.

The Federalists used the Sedition Act as a deliberate means of muzzling the Republican (as the Jeffersonians were then known) opposition. "Bystanders who made contemptuous remarks about Adams or his policies were hurried off to court. . . ." What did they meet in the courts? They were met, not by an exposition of fundamental American principles and a declaration that the Sedition Act was unconstitutional as a violation of the Bill of Rights, but with judicial conduct so prejudiced and sentences so severe that public resentment finally swept the Federalist party out of office, never to return. One of the Justices of the Supreme Court, Mr. Justice Chase, was brought before the House of Representatives in 1804 for impeachment; one of the charges against him, his "highly arbitrary, oppressive and unjust" conduct in Sedition Act cases.

The spirit of American institutions was preserved, not by the Courts—they did their best to destroy it—but by the people at the polls.

Only once in our history has the Supreme Court sought to stand out against tyranny, and the ease with which it was swept aside shows how weak a reed the Court would be against a determined attempt to destroy liberty in America. Lincoln, during the Civil War, violated the Constitution by suspending the writ of habeas corpus without Congressional authority. By suspending the writ, i.e., the right of appeal to the courts, Lincoln made it possible for military commanders and tribunals to suppress any and all liberties. But the writ that Chief Justice Taney issued for the release of Merryman from Fort McHenry was treated as so much paper by the military, and Lincoln disregarded Taney's protest that "the people of the United States are no longer living under a government of laws." Aside from this one puny gesture in 1861, the Court stood aside. The breaking of strikes by the military brought no protest from it and when the anti-war agitator and working class spokesman, Vallandigham of Ohio, appealed to the Court against his arrest and detention by a military commission, the Court seized on a technicality to evade a decision.

It is true that in the famous case of *Ex Parte* Milligan, the Supreme Court of the United States uttered memorable words: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." But it did not dare say this until after the Civil War was over, and the chief use of the decision since has been to protect property rights against emergency legislation to aid distressed farmers and

home-owners. It was forgotten during the World War. The Espionage Act, fathered by Woodrow Wilson and passed by Congress over the objections of William E. Borah and Hiram Johnson, who condemned it as unconstitutional, met with no obstacle in the courts.

Although, according to Charles Beard, the main business of the Department of Justice under the act "was not the apprehension of the people who gave aid and comfort to the Central Powers . . . but rather the supervision of American citizens suspected of radical opinions," and although "every practice dear to the Russian police of the old régime was employed by federal agents: provocative 'tools' were 'planted' among organizations of humble working people . . . and were instructed to incite them to unlawful acts; meeting places of such associations were raided without proper warrant, property was destroyed, papers seized, innocent bystanders beaten, and persons guilty of no offense at all rushed off to jail, subjected to police torture, held without bail, and released without recourse . . . ," no rebuke came from the courts.

After the Civil War, the Supreme Court of the United States at least made a protest against the practices it had tolerated. But after the World War, in the Espionage Act cases, the Supreme Court of the United States upheld the constitutionality of the act. Mr. Justice Holmes wrote the decisions, in March, 1919. He drew from the illegality of advocating murder or of shouting fire in a crowded theater conclusions that may some day provide the basis for severe restrictions on freedom of speech. It was as though

one argued from the right of the government to punish those responsible for automobile accidents that it had a right to confiscate automobiles. The principles of *Ex Parte* Milligan were abandoned; the conviction of a few Socialists for distributing some anti-war leaflets in Philadelphia was unanimously upheld. Mr. Justice Holmes said, "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."

Since that time there have come from the Supreme Court of the United States, from Mr. Justice Holmes and Mr. Justice Brandeis, some of the noblest defenses of human freedom ever penned, but these have been in minority opinions, dissenting or concurring. They are not the law as expounded by the Supreme Court. The Court itself upheld the suppression of civil liberties under the war time acts and under state criminal syndicalism and anarchy statutes. Mr. Justice Holmes said, ". . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." The loophole is easily widened under pressure.

Mr. Justice Brandeis wrote, "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. . . ." But he ended this opinion by concurring in the conviction of Charlotte Anita Whitney under the California Criminal Syndicalism Law.

The Court has a weakness for legal punctilio where human lives and liberties are concerned. No construction is too broad, or too narrow, when property rights require, and the Constitution becomes as flexible as an accordion. But it preferred to have the Chicago Anarchists hanged, Debs jailed, Sacco and Vanzetti sent to the chair, rather than violate legal etiquette. The Court has worked constitutional wonders to legalize some of the greatest steals in our history. The Yazoo frauds and the Credit Mobilier scandal are notable examples. It will cut through all procedural difficulties and overturn well-established precedents to review both law and fact when a utility company appeals from a rate-cut order. It will find loopholes. It will ignore the letter, it will violate the spirit, of the Constitution. It will invent new doctrines, or fall back on sophistries. But where neither property nor profit is at stake it would rather snuff out a life than a legal nicety.

The present Chief Justice, Charles Evans Hughes, is a liberal in so far as human rights are concerned, even if he is conservative on most (but not all) economic matters. Under his Chief Justiceship the pendulum has swung back a little, enough to give the Scottsboro boys a new trial, some hope after all these years to Tom Mooney, and perhaps—perhaps—free-

dom to Angelo Herndon if he comes knocking with a writ of habeas corpus instead of a writ of error, thus placating our constitutional Emily Posts. But the swing, the slight swing, toward liberalism on human liberties, serves only to light up the more starkly the Court's neglect of fundamental constitutional guarantees for almost a century and a half.

Those who rely on the Court for aid some day in fighting fascism are the victims of illusions the Court's record must dissipate. If the Court does, by some miracle, make a stand, one may be sure that it will be more futile than Taney's against Lincoln, for Lincoln was no enemy of liberty. Far more likely that the Court, if its power is not curbed, will play a double role in preparing the way for some shirted demagogue.

If the courts continue to override and hamstring our legislatures, they will play directly into the hands of those who sneer at the "inefficiency" of democratic processes. Fascists will find "constitutional" alibis ready for them and their destruction of American liberties in past decisions by the Court, not a few of them, unfortunately, by liberal Justices. New instruments of repression are at hand in the Court's interpretation of the deportation laws, of martial law, and of the criminal syndicalism law, and its approval of the suppression of freedom of the press by contempt of court proceedings.

There are some grim precedents. The anarchist, Williams, was deported in 1904. Part of the charge against him was that he made a speech criticizing the conviction of the Chicago Anarchists in 1887. A decision by Mr. Justice Holmes held that an immigra-

tion official might bar a man from this country without right of appeal to the courts, even though the man had proven his American citizenship. One of the worst reactionaries who ever sat on the Supreme Court, Mr. Justice Brewer, denounced the affair as a "Star Chamber proceeding of the most stringent sort." The use of martial law to break a miners' strike was upheld, also by Mr. Justice Holmes, and the right to redress for wrongs committed by the militia denied. In at least two cases the conviction of editors for criticizing judges has been upheld, one of the cases involving the power of a judge not only to forbid a trolley fare reduction but to keep newspapers from attacking him for it. The Dorchy decision may some day provide the basis for serious restrictions on the right to strike. The circumstances of that decision are interesting. Kansas in 1920 passed an Industrial Disputes act, forbidding strikes, setting up an Industrial Court to establish minimum wages and maximum hours, and providing for compulsory arbitration. When an employer objected to the maximum hours and minimum wages fixed by the Industrial Court, the Supreme Court held the wage and hour provisions unconstitutional. But two years later when a labor leader appealed to the Supreme Court against a sentence of six months in jail and a $500 fine imposed under the same act for calling a strike, the conviction was upheld. It is true that the decision, written by Mr. Justice Brandeis, was on narrow grounds. But the principle laid down, that the right to strike is not absolute, is one a reactionary Court might put to evil use. Lastly there is the Gitlow decision, sustaining the conviction of a Socialist edi-

tor under the New York Criminal Anarchy law. The circumstances of the case, and the tolerant attitude taken by the Court toward restriction of fundamental liberties, makes it possible to use legislation of this kind against persons neither criminal nor anarchist. These decisions would be a blessing to an American Fuehrer. They provide the basis for arbitrary arrests, suppression of opposition parties, use of armed force, curtailment of the right to strike.

Mr. Justice Harlan once protested (against a decision denying the right to trial by jury) ". . . It would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen." It is, to the Supreme Court of the United States.

XII

What Can Be Done About It?

It has often been said that the Supreme Court is the American House of Lords. In 1909, when the British "New Deal" was blocked by the House of Lords, Lloyd George broke its power by the threat to pack it with new peers pledged to vote away the veto power which the Lords had hitherto exercised over the Commons.

It is more difficult to pack the American House of Lords. The differences reveal the secret of its strength. The House of Lords in England is the visible embodiment of a privileged order, of an aristocracy, of an element undemocratic and anti-democratic. There the issue is clearly aristocracy vs. democracy. The American House of Lords, as truly as the British, is a citadel of privilege, the instrument of great vested rights, their bulwark against democratic processes. But the American House of Lords presents itself to the public in a different guise, a protective guise, in the guise of an impartial Court exercising no power beyond that of laying a new law beside the Constitution, and declaring whether or not they agree. It is thus able to mobilize in defense of its powers all the respect due a high tribunal, all the reverence properly accorded law and order and Constitution.

An American House of Lords in which sat representatives of the Morgans, Vanderbilts, Du Ponts, Astors, Rockefellers, Bakers, and other aristocrats of the

purse, overriding acts of Congress and State Legislature at will, could not hope to maintain power. The issue, thus nakedly presented, could only be resolved in one way by a free people. But the same great interests operating through judges, many of whom have been among their retainers; achieving its ends in the form of judicial process, masking its purposes and achievements in language the common people cannot understand, pose a formidable problem.

How can the power of the Court be curbed? How can our Supreme Court be reduced to a supreme *court,* instead of a supreme *law-giver?*

Legally and constitutionally there are four methods of curtailing the power of the Court to set up insurmountable barriers against social reform. It may be necessary to use all four before judicial supremacy is ended.

One way is by increasing the membership of the Court, "packing" it with liberals as it has so long been "packed" with conservatives; to "unpack" the Court, in former Senator Brookhart's vivid phrase. A second way is to exercise the power given Congress by the Constitution to regulate, and make exceptions to, the appellate jurisdiction of the Court. The third way is by an amendment taking out of the Constitution the doctrine of judicial supremacy that our judges have read into it. A fourth is by an amendment making amendment of the Constitution easier.

So bold and daring has the Court become in circumventing acts of Congress and nullifying or emasculating amendments to the Constitution that it may be necessary to "pack" the Court first, before attempting a more fundamental reform. Otherwise judicial

"interpretation" may undo the work of Congress or of the people.

President Roosevelt chose the most direct method —that of increasing the membership of the Court: adding one judge for each judge of seventy on the federal bench, increasing the membership of the Supreme Court to fifteen and, if all his appointments were wisely made, rendering the Court 9-6 liberal, instead of 6-3 conservative.

From a legal point of view the proposal broached to Congress by the President merely sought to aid overworked courts by adding new judges to the bench. But from a realistic point of view, he proposed a revolution: a revolution that might restore the Constitution of Marshall, Taney and Waite, a Constitution in whose broad and statesmanlike confines there would be room aplenty for social and economic reform.

The President, by giving the Supreme Court a liberal majority, might undo the Third American Revolution, the revolution worked by corporation lawyers and corporation-minded judges in our federal courts since the 1890's; and the clamor with which his message to Congress was greeted, an almost unanimous press in full cry against him, showed that his purpose was thoroughly understood.

Not the question of whether we should have nine judges or fifteen aroused the great interests who have come to control directly or indirectly our industries, banks, newspapers and radio stations; but the question of whether judges shall be appointed *now* by a liberal president, or later by a conservative.

The question is not an academic one. The person-

nel of the Supreme Court of the United States is a dollars-and-cents question on Wall Street, on Chestnut Street, on La Salle Street. The Supreme Court of the United States has done valuable work in protecting the trusts from the anti-trust laws. It saved the wealthy millions by holding the Income Tax law unconstitutional and later by ignoring the clause of the Income Tax Amendment which gives Congress power to tax income "from whatever source derived." The Court held that the words didn't mean what they say, and saved several billions in bonds from taxation. With the last few years one decision of the Court—the North Dakota Tax case—saved one railroad $12,000,000 and other railroads and utilities millions more taxes. Another decision, the reverse of the former, held that while the collapse of values must be taken into account in estimating taxes to be paid by utilities it could not be taken into account in fixing the rates they were to charge. No one knows how many millions of dollars this has added to the profits of utility companies. The AAA decision meant several hundred million dollars in profit to the processors.

The appointment of new Supreme Court Justices is, of course, no permanent solution. There is the difficulty of finding men to fill the places. Good Supreme Court Justices are hard to find. We have been fortunate in this generation to have a Holmes and a Brandeis, men who will rank among the handful of truly great jurists this country has had—and a country in which judges are supreme should breed great jurists. We were fortunate in having men of the calibre of Cardozo and Stone, and to a lesser degree of

Taft and Hughes. There are not many to take their place. It is hard to find lawyers who are not so deeply enmeshed in legal hocus pocus as to be able to take, not necessarily a profound and creative view of our problems, but at least a common sense one.

Nor can one ever be sure of the man one appoints to the bench, Lincoln appointed Field, one of the most vigorously reactionary judges in our history. Roosevelt was disappointed by Holmes in the Northern Securities case. Wilson appointed McReynolds as well as Brandeis. Coolidge named Stone; Hoover, Hughes and Cardozo. Judges grow older. Jackson put Taney on the bench and Taney was one of the most liberal judges in our history, yet Taney lived to hand down the Dred Scott decision long after Jackson was in his grave. It is hard to judge a man. A parallel has been drawn with Lloyd George's threat to pack the House of Lords. It is one thing to name new peers pledged to vote the "liberal" way on a single issue, the veto power of the Lords. It is another to name new judges who will agree generally with "liberal" reforms. If judges were appointed on a pledge to relinquish the judicial veto there is no guarantee that a later court would not reverse the precedent as so many precedents have been reversed in the past.

Instead of changing our judges, we can change their powers and procedure. The Constitution gives Congress the power to regulate the federal courts. Section 1 of Article III says, "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . ."

Section 2 says, ". . . In all cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases . . . the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such exceptions, and under such regulations as the Congress shall make. . . ." It would appear from this clause that Congress might make an exception of cases in which the constitutionality of a federal statute was involved, or that it might by regulation provide for 6-3, 7-2, or even unanimous decisions when a law is held unconstitutional. Similar regulations would have to be applied to the lower courts. It has always been held that, under the Constitution, Congress had full power over these courts. But it is not at all certain that the courts would accept a law forbidding them to hold federal laws unconstitutional.

The Courts might start out by asking whether, granted the power of Congress to regulate their jurisdiction and to make exceptions from it, Congress could by law force a Court to decide a particular way in a particular case. It might be argued that this would be, in effect, a bill of attainder. Bills of attainder are forbidden by the Constitution. If Congress cannot by legislation order a particular decision in a particular case, a conservative court might ask, can it order the courts to refuse justice to persons before it in a particular class of cases, i.e., those involving the constitutionality of an act of Congress? Would this not be discriminatory legislation? Would it not be unlawful and unconstitutional legislation? Would it not be beyond the bounds of proper regu-

lation; would it not be interfering with a coordinate branch of the government, thus destroying "checks and balances"? Would it not make a scrap of paper of the Constitution?

Let us admit that these are far-fetched arguments. It is true that no other courts exercise the wide powers of our own. "I would observe," an English judge said in a famous case, when the constitutionality of an Act of the British Parliament was challenged, "as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from Parliament. It was once said—I think in Hobart—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of Queen, Lords, and Commons? I deny that any such authority exists. . . . The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

But our courts have grown fat on power, and will not give it up. An American court would have argued otherwise. It would have said, "The proceedings here are judicial, not autocratic. We administer the laws, we do not make them. But what if Parliament were to make a man judge in his own case? Would not the courts be justified in disregarding a law that ran counter to all the traditions of Anglo-Saxon jurisprudence and to the Constitution? Is it not obvious that while the courts, of course, have no

right to make law, they have an equal right to disregard what is law in name but not in fact?"

There is another way in which a conservative court might circumvent a law forbidding them to hold a federal law unconstitutional. The court might grant that Congress has the right to forbid the courts to decide whether an exercise of federal power was constitutional or not; but could they do so where the federal power infringed on the domain of the states? The union is indestructible but it is also a union of indestructible states. No one would argue that the courts did not have the right to set aside as unconstitutional a law of a state which infringed on or cut down the powers of the federal government. Even the courts of federal countries in which there is no judicial supremacy have the power to set aside state laws as *ultra vires,* i.e., beyond their powers. But, it might be said, does not the reverse also held true? Could the federal government pass a law removing a governor from office, or changing the manner of his election? Obviously not. Yet Congress would forbid the courts to prevent such a law. It ~~might be argued in this way that while regulation of~~ the Supreme Court was constitutional in so far as ordinary legislation was concerned, it could not, from the very nature of the Union, apply in the case of laws which violate the rights of the states. It is surprising how few federal laws could *not* be set aside as violations of rights of the states.

The same objections hold to legislation providing that Congress could reenact by majority or two-thirds vote a law held unconstitutional by the Supreme Court. If a law is unconstitutional when first passed,

a conservative Court might ask, can it be made less so by being passed again? The Schechter brothers have been held not guilty of violating the law, can they now be sent to jail by act of Congress? I do not deny that a very strong case can be made out, on the basis of what the Constitution says, and what the Court has said about what the Constitution says, for limiting judicial power by law. I merely wish to point out that we are dealing with an institution which will take advantage of every constitutional sophistry and every possible legalistic toe-hold to maintain its power, and that there are many loopholes available.

It might be easier to obtain judicial acquiescence in a law providing for more than a majority, or for a unanimous vote, in decisions holding either a federal or state law unconstitutional. One argument for a two-thirds or three-fifths vote is by analogy with the two-thirds vote by which Congress can override the presidential veto. There is a more logical case for a unanimous vote. "This Court," Mr. Justice Sutherland said in holding the District of Columbia Minimum Wage Law unconstitutional, "by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." Though this line of decisions may have been unbroken, it has never been adhered to. "Rational," outside the Court, can have only one meaning. It means that the "doubts" of Chief Justice Taft and of Justices Clarke, Holmes and Brandeis in that case should have validated the law. In 1911

Goodnow's *Social Reform and the Constitution* suggested that "such a provision for unanimous decisions would also really bring it about that our practice would accord with our theory, which is that in order that an act of the legislature be declared void by a court its unconstitutionality, like the guilt of a person charged with crime, must be clear beyond a reasonable doubt." Ohio and North Dakota have constitutional amendments providing for unanimous decisions in their state Supreme Courts in such cases and the Ohio amendment, when attacked in the Supreme Court of the United States, was held not to be a denial of due process or equal protection.

But there are disadvantages to this solution. It means that we legalize and establish the power to declare laws unconstitutional. The Court has always denied that it has this power. "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional," the Court said in 1923. "That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy."

It must also be remembered that even unanimous decisions may be bad. Laying aside the question of the value of the NRA (which was no proper concern of the Court), it is deplorable that a unanimous decision should have set up what seems to be a bar against *all* federal wage and hour and collective bargaining regulations except in the cases of matters so purely interstate as railroad transportation.

The Constitution gives Congress the power to regulate the appellate jurisdiction of the Court, but the Court has declared unconstitutional or circumvented laws passed to regulate it. *Marbury v. Madison* held that Congress had no right to give the Supreme Court power to issue mandamuses. The law forbidding former officials and soldiers of the Confederacy to practice before the Supreme Court was declared unconstitutional. The law of 1867 forbidding the federal courts to enjoin the collection of a federal tax has been circumvented ever since the Income Tax cases by allowing a stockholder to obtain an injunction forbidding his corporation to pay the tax. Had this law been obeyed by the Courts, the processors would never have been able to enjoin payment of processing taxes and the government would not have lost several hundred million dollars in revenue.

It is interesting to note in this connection that Massachusetts and New York in their respective conventions ratifying the Constitution suggested that decisions of the Supreme Court be reviewable by a commission of "such learned men as he [the President] shall nominate." In 1821 Senator Johnson of Kentucky introduced a resolution to give appellate jurisdiction to the Senate in cases involving the constitutionality of federal or state law held void by the Supreme Court.

We can, of course, amend the Constitution. If we amend it to widen the powers of the federal government, we have no assurance that the Court will not entirely ignore or partially frustrate the purpose of the amendment. The Eleventh Amendment forbids suits against a state, but the Court nullified the

amendment by permitting suits to be brought against *officers* of a state. The difference was that instead of ordering the State of Virginia to pay interest on its bonds, the Court ordered the treasurer to make payment. The Thirteenth Amendment forbids involuntary servitude, but the Courts have refused to free a shanghaied sailor under the amendment. The Fourteenth and Fifteenth Amendments were ratified to protect the newly enfranchised Negro in his right to the equal protection of the laws and to safeguard his right to vote.

But in the Cruikshank case in 1875, the Court freed defendants accused of conspiring to prevent colored men from assembling peacefully, on the ground that the right to peaceable assembly antedated the Constitution and therefore was not a right granted by it or enforceable by the federal government, and that the amendment only gave Congress power to check state action. In the Reese case decided the same day, the Court—despite the Fifteenth Amendment—freed state election inspectors in Lexington, Kentucky, indicted for refusing to accept the votes of a Negro citizen. Finally, the Court in 1883 held the Civil Rights Act unconstitutional under the Fourteenth Amendment although it was originally believed that the Thirteenth Amendment alone was warrant for the act. Mr. Justice Harlan protested that "the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. . . . Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of

freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they had attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law." Amendments can be emasculated almost as easily as laws.

There is another way in which the Supreme Court can nullify an amendment. The Court has put the Tenth Amendment to a new use. The Tenth Amendment says, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Court is now applying this amendment, not to forbid the exercise of powers *not* delegated to the federal government but to curtail the exercise of powers specifically delegated to it. The Constitution gives Congress the power to tax. But in the AAA case the Court held that under the Tenth Amendment the federal government may not impose taxes if those taxes (in the Court's opinion) are part of a scheme which would interfere with the rights of the states. It held the processing tax unconstitutional. The Constitution gives Congress power to make uniform bankruptcy laws but the Court held the Municipal Bankruptcy Act unconstitutional. It said that, under the Tenth Amendment, Congressional power to make bankruptcy laws could not be exercised where, when and if the Court considered its exercise to be an invasion of States Rights.

Under this new interpretation of the Tenth Amendment, a grant of power, no matter how explicitly or unqualifiedly made to the federal govern-

ment, is subject to reduction by the court whenever and wherever the Court chooses to see an interference with rights it considers reserved to the states by the Tenth Amendment.

The most outrageous judicial technique of all was foreshadowed by the Prohibition cases. There it was argued that the Eighteenth Amendment was an "unconstitutional" amendment. It happens that the Constitution places no limit whatsoever on the amending process. A limitation of the kind would be incredible. It would fasten a dead hand forever on our institutions. The Court should have refused even to discuss so revolutionary an argument. Instead, it did consider the question raised, and it held that the Eighteenth Amendment *was* constitutional. What is to prevent a conservative court in the future from declaring some other amendment—an amendment ending judicial supremacy over legislation, or merely widening the federal commerce power to cover all industry—unconstitutional? The testimony of history shows it most unwise to underestimate the boldness of the Supreme Court where its own powers are concerned. A federal commerce amendment might be declared unconstitutional as destroying "an indestructible union of indestructible States." An Amendment taking from the Court its power to declare laws unconstitutional might be declared unconstitutional as destroying "a government of checks and balances." These phrases are not in the Constitution, but neither is "liberty of contract."

Judicial supremacy is no sensitive plant. Several measures may be required to kill it. It may be necessary first to pack the Court with liberals; then, by

Congressional statute, to attempt to take away its power to declare laws unconstitutional; then, to safeguard the change against a future conservative court (even a "liberal" Court may not be so tolerant of losing power), it may be necessary to amend the Constitution. Lastly, it would be wise to amend the amending process so that the Constitution may be amended by national referendum, instead of by the long and cumbersome present process, one that allows any minor politician in a strategic post in a state legislature to block ratification. It took eighteen years after the Income Tax decisions to ratify the Income Tax Amendment. The Child Labor Amendment in the spring of 1937 had yet to be adopted, although public opinion against child labor was strong enough to force passage of two child labor laws under the Wilson Administration, both of them later being declared unconstitutional by the Court. European democracies have neither judicial supremacy nor our cumbersome method of amendment. Amendment by national referendum would be the application of town meeting methods to modern conditions, providing for full debate by the people on our fundamental problems.

Whatever the remedy adopted, it is time the legend of judicial impartiality and omniscience were destroyed; judicial supremacy overturned. Democracy must curb the Supreme Court or the Supreme Court, instrument of our great concentrations of economic power, will destroy democracy. This is the choice before the American people.